(21,103.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 122.

SOUTHERN RAILWAY COMPANY, ED. S. HURST, BENJ. VOILS, AND TOM COX, PLAINTIFFS IN ERROR,

vs.

W. M. MILLER.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

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1 *Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Georgia.*

THE UNITED STATES OF AMERICA:

The President of the U. S. of America to the Honorable the Justices of the Court of Appeals of the State of Georgia, Greeting:

Because in the record and proceedings, as well as in the rendition of the judgments of the plea, which is in the said Court of Appeals of the State of Georgia, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the case there pending, of the Southern Railway Company, Ed. S. Hurst, Benj. Voils and Tom Cox, Plaintiffs in error, appellants, against W. M. Miller, defendant in error, wherein was drawn in question the validity of a statute of, or of an authority existing under said statute, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such validity, and the decision was against the title, right, privilege or commission, treaty, statute, or commission, a manifest error has happened to the great damage of the Southern Railway Company, Ed. S. Hurst, Benj. Voils and Tom Cox, as by their complaint appears, we being willing that error if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on
2 the 4th day of March, 1908, in the said Supreme Court to be then and there heard, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 3d day of February, (1908) in the year of our Lord, 1908.

[Seal U. S. Circuit Court, N. D. Georgia.]

O. C. FULLER,
Clerk of the Circuit Court of the U. S. for the Northern Dist. of Ga.

Allowed:

BENJAMIN H. HILL,
Chief Judge of the Court of Appeals of the State of Georgia.

Filed in office Feb'y 3, 1908.

LOGAN BLECKLEY, *C. C. A., Ga.*

3 *Citation.*

THE SOUTHERN RAILWAY COMPANY, ED. S. HURST, BENJ. VOILS, and TOM COX, Appellants,
versus
W. M. MILLER.

United States of America to W. M. Miller, and to Reuben R. Arnold, Howard Thompson, and Fletcher M. Johnson, Attorneys of Record for W. M. Miller, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the U. S., at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the State of Georgia, wherein the Southern Railway Company, Ed. S. Hurst, Benj. Voils and Tom Cox, are plaintiffs in error, and W. M. Miller, defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Benj. H. Hill, Chief Judge of the Court of Appeals of the State of Georgia. This the 3rd day of Feb'y, in the year of our Lord, 1908.

BENJAMIN H. HILL,
Chief Judge of the Court of Appeals of the State of Georgia.

Copy of the within Citation received this 3 day of February 1908, and all other and further service hereby waived.

REUBEN R. ARNOLD, *Atlanta, Ga.,*
Attorney for William M. Miller.

Filed in office Feb'y 3, 1908.
LOGAN BLECKLEY, *C. C. A., Ga.*

4 *Petition for Writ of Error.*

SOUTHERN RAILWAY COMPANY, ED. S. HURST, TOM COX, and BENJ. VOIL, Appellants,
versus
W. M. MILLER.

To the Honorable Benj. H. Hill, Chief Justice of the Court of Appeals of the State of Georgia:

Now come the Southern Railway Company, Ed. S. Hurst, Benj. Voils and Tom Cox, the above named appellants, by their attorney, Jno. J. Strickland, and complain and allege that they are citizens of the United States of America.

That the Southern Railway Company filed in the Court below a petition to remove the suit before trial into the United States

Circuit Court, upon the ground that the petition on its face made a severable controversy between the Southern Railway Company and W. M. Miller; and that the Southern Ry. Co., being a non-resident of the State of Georgia, and W. M. Miller being a resident thereof, the case should be removed. This petition was overruled and was carried to the Court of Appeals, where, on the 25th day of May, 1906, final judgment was rendered against your petitioner, the Southern Railway Company, by said Court of Appeals of the State of Georgia, that being the highest court of law and equity in the State of Georgia, to which said case could be carried. The decision as rendered by said court being as follows:

1. "A railway corporation can be jointly sued with three of its servants, when it is sought to make the corporation liable only by reason of the negligent acts of its said servants in the operation of a train under their management and control.

2. "Such action can be maintained by an employee, against the railway company and other employees jointly, when the injury was caused by the joint negligence of the employees within the scope of their employment.

3. The right of removal to the Federal Court, under the acts of Congress of March 3, 1887, and Aug. 13, 1888, depends upon the state of the pleadings and the record at the time of the application for removal. If, upon the face of the declaration,—the only pleading filed in the case,—the action is joint, for the purpose of determining the right of removal the cause of action must be deemed to be joint. "A defendant has no right to say that an action shall be several which a plaintiff elects to make joint."

4. "Where a joint suit is brought by a resident of this State against a foreign corporation operating a railroad in this State, and against three of its employees who reside in this State, for an injury resulting from negligent acts, in the commission of which all the defendants participated, such suit is not removable by the corporation, as a separable controversy; and the refusal of the judge to pass an order removing the case to the Circuit Court of the United States was not erroneous."

So. Ry. Co., et al vs. W. M. Miller, 1 Ga. App. 616 (Four headnotes.)

Your petitioners, when said case was returned to the trial court, filed a plea to the jurisdiction, upon the ground that the case had once been sued in that Court by the same plaintiff against the So. Ry. Co., for the same cause of action, and had been removed into the United States Circuit Court, which removal had the effect to move the cause of action as well as the case; that the case was dismissed in the U. S. Circuit Court, and could not be recommenced except in that court. This plea was overruled by the court below. Your petitioners then filed a demurrer to the suit, in so far as all of the defendants below, except the Southern Railway Company was concerned upon the ground, in brief, that the petition on its face did not make a case against any of the defendants below, except the So. Ry. Co., and did not make a joint action good in law against the So. Ry. Co., and the other defendants. This was over-

ruled. The case went to trial. Your petitioners were unsuccessful and removed their case to the Court of Appeals of the State of Ga., where on the 15th day of January, 1908, final judgment was rendered against your petitioners by the Court of Appeals of the State of Georgia, that being the highest court of law and equity in the said State of Ga., to which said case could be carried; con-
7 firming the court below wherein it was adjudged both that, the court below had jurisdiction to try said case, and that there was a joint action and one not severable in the petition. All said questions were made in the Court of Appeals and were argued in the Court of Appeals of the State of Ga., the brief in part thereof, being as follows:

I.

"The first proposition involves the question as to whether or not the Act of Congress providing for the removal of a case from a State Court to a Federal Court removes the cause of action as well as the case. The fact that it was the same case sued in both instances will not be disputed. The fact that new parties were added to the last case in no way effects the question. They were unnecessary parties. The plaintiff, under the law could recover against the defendant railway company, independent of their other parties. While he might or might not have the right to join them he was not compelled to do so. Joining them therefore in no way effected the question at issue. It is true the question here made was decided adversely to my contention in the case of McIver vs. F. C. & P. R. R. Co., 110 Ga., page 223, by a divided bench. The true law of the case, however, is contained in the dissenting opinion of Justice Simmons and Little in that case, which is found on page 231 of the same volume. Justice Little who wrote the dissenting opinion, quoting from the case of Gordon vs. Longstreet, 41 U. S.,
8 97. uses this language.

"One great objection in the establishment of the Courts of the U. S., and regulating their jurisdiction was to have a tribunal in each State, presumed to be free from local influence;" and it was doubtless the purpose of Congress in providing for the removal, by a non-resident defendant, of a case brought against him in a State Court, to protect such non-resident in the trial of his case from the local influence which might exist in favor of the resident plaintiff in the State Court. This purpose would be entirely defeated if, after a plaintiff has instituted an action to recover damages for an injury which she claims to have sustained by reason of the wrongful act of the non-resident defendants, as in this case, and has named a particular amount as the proper measure of damage, and, exercising the right conferred by the Congress, the defendant by lawful proceedings stays the jurisdiction of the State Court and brings the action before the Federal Court for determination, and when the case has been dismissed in the Federal Court, the plaintiff may again bring and maintain her action against the same defendant for the same cause for which she first complained in the State Court, by arbitrarily fixing her damages in the second suit

at a less amount, so as to place the last case brought out of the jurisdiction of the Federal Court."

If the plaintiff could not change the amount so as to oust the Federal Court of jurisdiction, he could no more change the
9 number of defendants for that purpose.

In the case of Kern, 103 U. S., 485, it was said: "The suit and the subject matter of the suit are both transmitted to the Federal Court by the same Act of removal."

The plaintiff of course can manage his suit as he sees fit; he can dismiss and sue again, if he wishes; but the subject matter of the suit when once transferred is out of the jurisdiction of the State Court for good.

The decision in the 110 Ga. is not binding on the Supreme Court of Georgia, nor is it binding on this Court. The reasoning of the Court at a glance is apparently not sound. It is in conflict with reason, lying at the foundation of the State authorizing removal. It is in conflict with the decisions of the Supreme Court of the United States on the subject; and is in conflict, I believe, with almost every State in the Union where the question has been dealt with.

The Supreme Court of Georgia, as set out in the dissenting opinion, in the case of Cox, 68 Ga., page 446, seems to me decides the question. It was there ruled that when a case has been removed from a State Court to the Circuit Court of the United States, the jurisdiction of the former cases, and after the non-suit in the Federal Court the case can not be renewed in the State Court within six months so as to avoid the statute of limitation. Our
10 State provides that when a case has been dismissed the same may be renewed within six months, and the statute of limitation can only be made to apply to the date at which the first suit was taken. There is not but one reason why this suit could not be renewed in the State Court under this rule, and that is that the cause of action as well as the case having been removed the State Court no longer had jurisdiction over it.

II.

"The next question presented by the record is whether or not the demurrer filed by the defendants below should have been sustained on any one or all of the grounds.

The questions made by the demurrer are possibly concluded by the opinion of this Court when this case was heard before. However, I submit the following argument as to why it should have been sustained upon the proposition that there was a common law and statutory cause of action united in one count against separate defendants.

An inspection of the petition will show that there is but one count. If there is any cause of action set out against Hurst Voils and Cox, it is based on the common law.

Blackstone, page 430, it is cited: "If a servant by his negligence does any damage to a stranger, the master shall answer for his negligence. If a smith's servant lames a horse while he is shoeing

him an action lies against the master and not against the
11 servant." This rule has been modified in America to the extent that the servant may likewise be liable with the master where the act of negligence is one of misfeasance and not mere non-feasance. 1 Am. & Eng. Enc. of Law, 2d Ed., p. 1131. 20 Am. & Eng. Enc. of Law, 2d Ed., 52. Brice vs. So. Ry. Co., 125 Federal Reporter, 959. Kimbrough vs. Boswell, 119 Ga., 203. Reid 49 Ga. 208. So. Ry. Co. vs. Grizzle, 124 Ga. 735.

There is certainly no statute of Georgia providing liability for one employee against his fellow servant.

The act charged against these fellow servants is not one of malfeasance, but is non-feasance, and therefore makes no cause of action at all against them.

"'Plaintiff's cause of action against the Southern Railway Company, the defendant, is purely statutory. Under the common law a servant could not recover against his master for the negligence of a fellow servant. Can these two separate and distinct causes of action be joined in one count? If they can not then the railway company was entitled to remove its cause.

"In the case of Kendrick, 81 Mo. 521, the *h. n.* is in these words: "A common law action for negligence can not be joined in the same count with one for statutory negligence." So far as I have been able to find out this decision has never been counted anywhere and it is a precedent to say the least of it.

12 "In the case of McDormant vs. So. Ry. Co., 87 Mo., 286, it is decided that an action for negligence of a fellow servant should not be blended in the same county with one for the negligence of a vice-principal. The identical question, I think, has never been decided for Georgia, but the principal has been recognized in a number of cases. In the case of the Exposition Cotton Mills, 83 Ga. 441 the h. n. is as follows:

"The original declaration being for damages to plaintiff's property shipped over defendant's railroad, with no allegation that defendant received the same from a connecting railroad as in good order, and this Court having held that evidence to show that the property was damaged on a connecting railroad before defendant received it, was admissible, an amendment to the effect that defendant had received it as in good order from the connecting railroad, was properly rejected as seeking to add a new and direct cause of action. The original action was upon a common law liability, the amendment upon a statutory liability."

If a common law action brought can not be amended by adding a statutory remedy for the same act, it would follow that the two would not be blended in one count.

In the case of Charleston & Western Carolina Ry. Co. vs. Miller, 113 Ga., page 15, on the authority of the case above quoted the Supreme Court says:

13 "Where an action is brought solely upon a common law liability, it is error to allow an amendment thereto which seeks a recovery upon a statutory liability, such an amendment would add a new and distinct cause of action.

In the case of Kavanaugh 120 Ga., page 67, again recognizing the case above quoted the Supreme Court says:

"An action formed under the Civil Code, 2298, can not be converted into a suit upon the common law liability for negligence. The liability in the first instance is statutory, and in the other it exists as common law."

It has also been held that an action for a separate and joint tort can not be joined against two defendants.

See 1st Enc. of Pleading & Practice, page 209, and cases cited. 15 Enc. of Pleading, 547, 561, 562. 16 Enc. of Pleading, 281.

The reason for the rule that a common law and statutory cause of action can not be joined seems to be founded, not merely in fancy, or upon the formal rules of procedure, but in common justice.

From all the authorities the rules deducible seems to be that in order for a plaintiff to recover against two joint defendants the law must require at least the same proof against each. The fact that they might set up whatever defenses were needed provided a jointure, but so far as the plaintiff is concerned the allegations to make a joint case must be such that he will close his evidence and have made a case against both at the same time. In the
14 case at bar Plaintiff could show his injury, the absence of negligence on his own part, and he would have made a case against the railroad, but not against the other defendants. The rule I have announced, if you will apply any given case that may occur to you, I think you will find that it will fall under it, and show its soundness. It has been held as stated that a plaintiff can not recover in the same action against two persons for a joint tort committed by both, and a separate tort committed by one. It is likewise held that a recovery can not be had against two defendants where it is sought against one upon a written contract, and against both upon an oral agreement.

Addecker v. Schrubee, 45 Iowa, 315."

All of which appears in the record, the opinion and final judgments of said Court of Appeals, confirming the judgment of the Court below, whereby manifest error has happened to the great damage of your petitioners,

Wherefore your petitioners pray for an allowance of a writ of error from the Supreme Court of the U. S. to the Court of Appeals of the State of Georgia, and the Justices thereof, to the end that the record in said matter may be removed into the Supreme Court of the U. S., and the error complained of by your petitioners may be examined and corrected and said judgment reversed, and your petitioner will ever pray, etc.

JNO. J. STRICKLAND,
Athens, Ga., Att'y for Pet'rs.

Filed in office Feb'y 3, 1908.

LOGAN BLECKLEY,
C. C. A., Ga.

15 THE SOUTHERN RAILWAY COMPANY, ED. S. HURST, BENJ. VOILS, and TOM COX, Appellants,
versus
W. M. MILLER.

The above entitled cause coming on to be heard upon the petition of the appellants therein for a writ of error from the Supreme Court of the U. S., to the Court of Appeals of the State of Georgia, and upon the examination of said petition and the record in said matter, and desiring to give the petitioners an opportunity to present to the Supreme Court of the U. S. the questions presented by the record in said matter,

It is ordered that a writ of error be and the same is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by the said petitioners be and the same is hereby approved.

It is further ordered that this petition and order act as a supersedeas until the case is finally disposed of in the Supreme Court of the U. S. This February 3rd, 1908.

BENJAMIN H. HILL,
Chief Judge of the Court of Appeals of the State of Georgia.

Filed in office Feb'y 3, 1908.
LOGAN BLECKLEY,
C. C. A., Ga.

16 *Bond on Writ of Error from the Supreme Court of the U. S. to the Court of Appeals of the State of Georgia.*

SOUTHERN RAILWAY COMPANY, ED. S. HURST, BENJ. VOILS, and TOM COX, Appellants,
vs.
W. M. MILLER.

Know all men by these presents that we, the Southern Railway Company, Ed. S. Hurst, Benj. Voils and Tom Cox, as principals, and the United States Fidelity & Guaranty Company of Baltimore, Md., as Security, are held and firmly bound unto W. M. Miller, in the sum of Twenty-Thousand ($20,000.00) Dollars, to be paid to the said W. M. Miller, his administrators and executors, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators and successors jointly and severally by these presents.

Signed with our seals, and dated, this 31st day of January, 1908.

Whereas, the above named plaintiffs in error have prosecured the writ of error in the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Georgia.

Now therefore the conditions of this obligation are such
17 that if the above named plaintiffs in error shall prosecute their writ of error to effect and answer all costs and damages,

including settling the judgment now existing in said case according to its legal effect if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

SOUTHERN RAILWAY CO., [L. S.]
ED. S. HURST, [L. S.]
BENJ. VOILS, [L. S.]
TOM COX, [L. S.]
By JNO. J. STRICKLAND, [L. S.]
Att'y of Record, [L. S.]
Principals.
THE UNITED STATES FIDELITY & GUARANTY CO.,
By C. H. NEWTON, *Attorney, and* [L. S.]
JNO. J. STRICKLAND, *Attorney,*
Security. [SEAL.]

Approved this February 3rd, 1908.
BENJAMIN H. HILL.
Chief Judge of the Court of Appeals of the State of Georgia.

Filed in office Feb'y 3, 1908.
LOGAN BLECKLEY,
C. C. A., Ga.

18 *Assignment of Error.*

Assignment of Error on Writ of Error from the Supreme Court of the U. S. to the Court of Appeals of the State of Georgia.

SOUTHERN RAILWAY COMPANY, ED. S. HURST, BENJ. VOILS and TOM COX, Appellants,
vs.
W. M. MILLER.

To the Court of Appeals of the State of Georgia:

Now come the Southern Railway Company, Ed. S. Hurst, Benj. Voils and Tom Cox, the said plaintiffs in error, and respectfully submit that from the record, proceedings, decisions and final judgments of the Court of Appeals of the State of Ga., in the above entitled matter there is manifest error in this towit:

1. The Court erred in adjudging that under the acts of Congress providing for the removal of a case from a State Court into the U. S. Circuit Court that a case once removed could be dismissed in that Court, and again sued in the State Court.

2. The Court erred in holding that the State Court had jurisdiction to try the case after the same case had been removed into the United States Circuit Court, and in holding that under the acts of Congress providing for such removal the State Court could again

take jurisdiction thereof, and in holding that the plea to the jurisdiction should not have been sustained below.

3. The Court erred in holding that the petition on its face did not make a severable controversy authorizing the Southern Rail-
19 way Company to remove the case into the U. S. Circuit Court.

4. The Court erred under the record in confirming the judgment of the Court below in said case.

JNO. J. STRICKLAND,
Att'y for Plaintiffs in Error.

Filed in office Feb'y 3, 1908.
LOGAN BLECKLEY,
C. C. A., Ga.

20 GEORGIA,
Hall County:

Be it remembered that to the May Term, 1906, W. M. Miller brought a suit in the City Court of Hall County against the Southern Railway Company, Ed. S. Hurst, Benjamin Voils and Tom Cox, the same being an action for damage, alleged to have been produced by the joint acts of the defendants therein, the Southern Railway Company and the said Ed. S. Hurst, Benjamin Voils and Tom Cox,—who were employees of the said Southern Railway Company, being co-employees with the plaintiff, W. M. Miller. On May 15, 1906, before the appearance docket was called in said case, the So. Ry. Co. filed its petition in regular form, to remove said case into the U. S. Circuit Court for the Northern District of Georgia, and filed therewith a proper bond with good security. Said petition and bond were accepted and approved, but an order passed refusing to remove the same; said order being dated May 25, 1906, and signed by the honorable G. H. Prior, Judge, then presiding. To this order refusing to remove the So. Ry. Co. excepted, which bill of exceptions was signed on the 4th day of June, 1906, and the case then carried to the Supreme Court of Georgia, and suspended in the City Court of Hall County, an order having been passed to that effect at the time the order refusing to remove was passed. Said case was transferred to the Court of Appeals and in April, 1907, a judgment rendered therein confirming the judgment of the Court below. Before the remittitur was made the judgment of the Court below, the
21 *the* defendants, the So. Ry. Co., Ed. S. Hurst, Benjamin Voils and Tom Cox filed a plea in bar to said suit, upon the ground that the same suit had been formerly brought to the Superior Court of Hall County, and it, with the cause of action upon which it was founded removed into the U. S. Circuit Court for the Northern District of Georgia; that the plaintiff had there dismissed his suit and filed it again in the City Court of Hall County; that the case having been removed to the Federal Court that Court alone had jurisdiction and it would have to be resued there if at all, and that the City Court of Hall County did not have jurisdiction. All of which fully appears in said plea. On May 23rd, 1907, the Hon J. C. Boone, Judge of the City Court of Hall County, presiding, passed an order

overruling said plea, and retaining jurisdiction of the case. On May 30th, 1907, the said defendants filing said plea tendered exceptions pendente lite to the order of the Judge overruling said plea, which were regularly certified and entered of record and became a part of the record in the case.

When said plea was overruled, the said Southern Railway Company, Ed. S. Hurst, Benjamin Voils and Tom Cox, filed their joint demurrer to the petition upon the ground therein set out. On May 23 1907, on the hearing of said demurrer, the Honorable J. C. Boone, Judge presiding, overruled the same. On May 30, 1907, exceptions pendente lite to the overruling of said demurrer were regularly allowed, and the same recorded and became a part of the record,
22 as will fully appear by reference to the same. The case was then tried and resulted in a verdict for plaintiff, for Ten Thousand ($10,000.00) Dollars. The defendant filed a motion for new trial upon the grounds therein stated.

On August 2, 1907, the time set for the hearing of said motion, the defendants filed an amended motion for new trial upon the grounds therein stated, which were regularly allowed and brief of evidence was agreed on and approved and the case heard. The judge held up his decision until the 19 of August, 1907, when he passed an order overruling the motion for a new trial upon each and all of the grounds therein made.

Now come the defendants below, towit, the So. Ry. Co., Ed. S. Hurst, Benjamin Voils and Tom Cox, and within thirty days from the time said order overruling said motion was passed, and excepted thereto, and thereupon makes the following special assignments of error.

1. The Court erred in not sustaining the plea in bar upon the grounds therein stated, which order was excepted to at the time, and exception allowed and upon which plaintiffs in error now assign error.

2. The Court erred in not sustaining the demurrer filed as appears in the exceptions pendente lite to said order refusing the same, which is made part of the record, and upon which order of refusal plaintiffs in error now assign error.

3. The Court erred in refusing to grant a new trial upon
23 each of the grounds contained in the original and amended motion.

4. The Court erred in holding in passing on said motion for new trial, that while he was not exactly satisfied with the amount of the verdict rendered in this case, yet what amount the Court would have given was not the controlling question, but the amount was a question for the jury, under the charge of the Court, and the jury having determined the amount, a new trial would not be granted because of the amount of the verdict alone.

Plaintiffs in error specify as all of the record and all of the evidence material to a clear understanding of the errors complained of the following:

1. The original petition.

2. The petition to remove together with the various entries thereon.

3. The exceptions pendente lite to the order overruling the demurrer.
4. The answer filed on May 16, 1907.
5. The exceptions pendente lite to the order overruling the plea.
6. The verdict and judgment in the case.
7. The entire charge of the Court as delivered.
8. The original and amended motion for new trial.
9. The brief of evidence as approved together with the exhibits attached.
10. The order overruling the motion for new trial.

Plaintiffs in error aver that the recitals in the foregoing
24 bill of exceptions are true. They pray that the same be certified in terms of the law, and the Clerk of the City Court of Hall County ordered to make out a complete copy of such parts of the record as are in this bill of exceptions specified and certify the same as such, and cause the same to be transmitted to the next term of the Court of Appeals next, that the errors alleged to have been committed may be considered and corrected.

JNO. J. STRICKLAND,
Athens, Ga.,
ED. QUILLIAN,
Gainesville, Ga.,
Att'ys for Pl'ffs in Error.

I do certify that the foregoing bill of exceptions is true, and that the same specifies all of the evidence and likewise specifies all of the record material to a clear understanding of the errors complained of; and the Clerk of the City Court of Hall County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such and cause the same to be transmitted to the next Term of the Court of Appeals of said State of Georgia, that the errors alleged to have been committed may be considered and corrected.

This September 17", 1907.

J. C. BOONE,
Judge C. C. H. C.

I acknowledge due and legal service of a copy of the foregoing bill of exceptions and waive further service. This Sept. 25, 1907.

ARNOLD & ARNOLD,
HOWARD THOMPSON,
FLETCHER M. JOHNSON,
Attorneys for W. M. Miller.

25 Filed in office and docketed September 26th 1907.
W. B. SMITH, *Clerk.*

Clerk's Office, City Court of Hall County.

GAINESVILLE, GA., *Sept. 30th*, 1907.

I hereby certify, that the foregoing Bill of Exceptions, hereunto attached, is the true original Bill of Exceptions in the case therein

stated, towit: So. Rwy. Co., et al., Plaintiff- in Error, vs. W. H. Miller, Defendant in Error, and that a copy thereof has been made and filed in this office.

Witness my official signature and the seal of said Court affixed the day and year first above written.

W. B. SMITH,
[SEAL.] *Clerk City Court.*

Endorsed: Case No. 772. Court of Appeals of Georgia October Term 1907. Southern Ry. Co. et al. versus Miller. Bill of Exceptions Filed in Office Oct. 1 1907. Logan Bleckley, C. C. A., Ga.

26 GEORGIA, *Hall County:*

To the City Court of Hall County:

The petition of William M. Miller shows to the Court the following case:

1.

The defendants hereto are the Southern Railway Company, which is a railroad corporation, running a line of track in said County, and Ed. S. Hurst, of Fulton County, Georgia, Benjamin Voils of Fulton County, Georgia, and Tom Cox, of Dekalb County, Georgia.

2.

The said defendants have endamaged plaintiff in the sum of Twenty Thousand Dollars ($20,000) on account of the case hereinafter stated, the injury occurring in Hall County, Georgia.

3.

On the 17th day of June, 1904, plaintiff was in the employment of the defendant railway company, as engineer on a freight train. On said June 17, 1904, plaintiff was going north on freight train No. 72. Upon leaving Atlanta, and at Armour's station, plaintiff received an order to the effect that train No. 81 had the right of track over No. 72 between Lula and Suwanee. It is alleged that under the defendant railway's rules and regulations the plaintiff's train No. 72, was a Superior train to No. 81, plaintiff's train being a second class train, and No. 81 being a third class train, and
27 moreover No. 72 being north bound, which gave it the right of way over No. 81 which was south bound. The order aforesaid, therefore, gave the plaintiff the right to carry his train to the station of Suwanee.

4.

Accordingly, the plaintiff proceeded to run to Suwanee, and when the plaintiff got to Suwanee, he received another order from the defendant railway's authorities, which directed him to meet No. 81 at Buford, further up the road, and under this order plaintiff proceeded with his train to Buford where he was directed to meet No. 81.

5.

When plaintiff got to Buford, as was his duty, he waited until further orders, and waited in the neighborhood of three hours, at

which time he received another order from the defendant railway's authorities, to the effect that No. 81 had been annulled between Flowery Branch and Armour's station. It is alleged that under defendant railway's rules a train which is twelve hours late loses, without any order at all, all its rights, and it is alleged that No. 81 was more than twelve hours late at all points north of Flowery Branch, and it is alleged that this order, in thus annulling its rights below or south of Flowery Branch, effectually took No. 81 off of the road, and made it a dead train, and allowed plaintiff's train to proceed on its own rights, and to proceed as a superior train to No. 81, and without any regard to No. 81.

28

6.

Upon receiving this order plaintiff pulled out from Buford, and proceeded with due care to run to Flowery Branch. When plaintiff got to Flowery Branch, and when he was about five rails away from the south switch at said point, plaintiff discovered (which is alleged to be the fact) that the switch was turned wrong, and from the main line, and so as to throw the train into the siding. Plaintiff immediately shut off his engine, and put his air into the emergency. It was all he could do, inasmuch as No. 81 was standing in the siding at this point, and to avoid being killed or mangled in the collission, and constrained by the emergency to do so, plaintiff in the exercise of due care, jumped from the engine, and in doing so was greatly and permanently injured.

7.

In a few seconds after plaintiff's jump the engines did collide with a terrible crash upon said side track.

8.

It is alleged that the plaintiff was free from fault.

9.

It is shown that the defendant, Cox, was the conductor of No. 81, and had entire charge of said crew, the defendant, Voils, was the engineer thereof, and the defendant, Ed. Hurst, was the front brakeman or flagman on said No. 81, and that each and all of said individual defendants represented the defendant railway com-

29 pany in the operation of train No. 81, and in the placing of train No. 81 on the side track at said point, and in the leaving open of the switch at said point.

10.

It is shown to the Court that it was the duty of all of the defendants hereto with reference to plaintiff and his said train, to have said switch turned so as to keep said train of plaintiff on the main line. It is alleged that the individual defendants hereto constituted the crew of said train No. 81, and each and all of said individual defendants, representing the defendant railway company, participated in the turning wrong of said switch, and after turning it wrong, negligently permitted it to stay turned away from the main line.

11.

It is shown to the Court that said switch was turned to said siding by said Hurst, the brakeman aforesaid, and No. 81 went into said siding, and said Hurst negligently failed to turn said switch back to the main line, as was his duty. It is alleged that the negligence of said Hurst, and the negligence of the railway company (the said Hurst representing the railway company in this regard) concurred in the negligent turning and failure to turn back of said switch. It is further alleged that the said Cox, who represented the railway company in the control and management of said train, was under the duty to see that said switch was turned from the main
30 line, he being responsible for the proper turning of said switch, under the defendant railway's rules, customs and practices, and it is alleged that said Cox negligently failed to look after said switch after No. 81 was in the siding and negligently failed to turn it back to the main line, as was his duty. In these particulars the said Cox's negligence concurred with the negligence of the defendant railway company.

12.

It is alleged that the negligence of the defendant, Voils, concurred with the negligence of the defendant railway company, in that said Voils, as engineer, after his engine got into the siding, in the exercise of ordinary care knew, and must have known (as it was visible to him) that the switch was turned wrong and to the main line, yet he failed to exercise ordinary care to report the same to the other members of the crew, or to take any steps to have it turned right, as was his duty. In these particulars his negligence concurred with the negligence of the defendant railway company.

13.

It is alleged that it was negligence in said three individual defendants to unlock, and cause to be unlocked, said switch, and cause the same to be turned to the main line, and their negligence was the negligence of the defendant railway company, inasmuch as they represented the railway company in the operation of said train No. 81 upon this occasion.

14.

It is alleged that it was negligent in the three individual
31 defendants hereto not to discover that said switch was turned wrong, it being perfectly patent and visible that it was turned wrong, and in said failure to turn the same correctly to the main line, the said three individual defendants represented the defendant railway company, and their negligence all concurred.

15.

It is alleged that said three individual defendants, representing the said railway company, owed to plaintiff the duty to have said switch turned to the main line, under the defendant railway's rules and regulations, and under the exercise of ordinary care, and their negligence concurred with that of the defendant railway company.

16.

It is further alleged that with said switch turned wrong the individual defendants hereto, who were the members of the crew of No. 81, should have flagged the plaintiff's train, if for any reason the switch was to remain turned to the side track, and it is alleged that notice was — given plaintiff that said switch was turned wrong until plaintiff got to a point on the track where he could see it, which was a few rail lengths away, and not in time to escape, and in this negligence the individual defendants represented the defendant railway company, and the negligence of all concurred.

17.

Plaintiff was permanently injured as follows: He was
32 bruised, injured and mashed in and about his head, neck, shoulders, body, back, abdomen and limbs. His right leg, ankle and knee, the right shoulder, and the muscles of the right arm were all twisted, bruised and seriously injured. The bones in the right knee and ankle were permanently dislocated and displaced. The knee joint was stretched and ruptured, and was much swollen and has never gotten well. The ligaments, nerves and muscles of the ankle were torn. The right shoulder was stretched, and the muscles and nerves thereof torn and stretched, as likewise the muscles of the right arm. Plaintiff's capacity to labor and earn money has been totally destroyed. He will never be able to do railroad work again. The foot, ankle and leg are stiff and weak, and he can not walk without assistance. The right shoulder and arm were weakened, and he can not exert it without pain. He has suffered and will continue to suffer great pain. All time up to filing this petition has been lost. Doctors and medical bills are $200.00. Plaintiff was earning from $150.00 to $200.00 per month. He was about 35 years of age, and had an expectancy in life of 31 years, during which time his capacity to labor and earn money has been destroyed. For each and all of the foregoing items of damage, plaintiff sues.

18.

Plaintiff alleges that the emergency upon him, when he jumped,
was great; that a collission was threatened, and actually did
33 occur; that in the exercise of ordinary care, it was necessary for him to jump to save his life or save great bodily injury, and that such emergency and threatened collission were brought about by defendant's negligence, it being further alleged that the crew of train No. 81 had allowed the engine to stand to-close to the track, and it should have been further back in the siding.

Wherefore plaintiff prays process may issue, requiring defendants to be and appear at the next term of this Court to answer plaintiff's complaint.

ARNOLD & ARNOLD,
HOWARD THOMPSON,
FLETCHER M. JOHNSON,
Plaintiff's Attorneys.

34 W. M. MILLER
vs.
SOUTHERN RWY. CO. and ED. S. HURST, BENJAMIN VOILS, and TOM COX.

Suit for Damage in the City Court of Hall County, Ga.

Petition of the Southern Railway Company for Removal to the Circuit Court of the United States for the Northern District of Georgia.

To the City Court of Hall Co., Ga.:

Your petitioner, the Southern Railway Company, one of the defendants in the above stated case, respectfully shows to this honorable Court:

Paragraph I.

That it is one of the defendants in the above suit, which is of a civil nature now pending, and that said suit is brought to recover the sum of Twenty Thousand Dollars ($20,000.00), for personal injuries of plaintiff.

Paragraph II.

Your petitioner further shows that said suit was begun in the City Court of Hall, in Hall County, Georgia, by the filing of a petition for the issuance of process, said cause being returnable to the May term, 1906, of said Court, and that the time required for answering or pleading to the declaration or complaint of the plaintiff, under the laws of Georgia, and the rules of said Court, has not arrived.

35 Paragraph III.

Your petitioner further shows that controversies of a civil nature are set up in said petition of plaintiff, which are wholly between citizens of different States, towit: your petitioner who was at the time of the commencement of said suit, and still is, a corporation incorporated under the laws of the State of Virginia, then and now a resident of the State of Virginia, and plaintiff who was and still is a citizen of the State of Georgia.

Paragraph IV.

Your petitioner further shows that the controversies and causes set up against it and its co-defendants, Ed. S. Hurst, Benjamin Voils and Tom Cox are separable controversies and seperable and distinct causes of action.

Paragraph V.

Your petitioner further shows that plaintiff's petition, eliminating paragraphs 9, 10, 11, 12, 13, 14, 15 and 16, still make a distinct charge of negligence against your petitioner, alone sufficient in and of itself to give rise to the cause of action, and which, if proven,

would entitle plaintiff to recover against this defendant without reference to any act charged against the co-defendants already mentioned; and for that reason there is a separable controversy and a separable and distinct cause of action between plaintiff and your petitioner that can be tried independent of the other defendants.

36 Paragraph VI.

Your petitioner further shows that in addition to the reason above assigned why the controversies are separable, that this suit is against your petitioner and the said Ed. S. Hurst, Benjamin Voils and Tom Cox as co-defendants by reason of alleged personal injuries sustained by the plaintiff, Wm. M. Miller, on the 17th day of June, 1904, at Flowery Branch in said County of Hall.

Paragraph VII.

The plaintiff, W. M. Miller, at the time of the occurrence of his alleged personal injury was an engineer in the employ of your petitioner, and as such in charge of one of petitioner's freight trains known as train No. 72, which train ran into an open switch as plaintiff alleges, at Flowery Branch, and collided with freight train No. 81 standing on the siding, in consequence of which plaintiff was injured, and your petitioner is sought to be held liable for said alleged personal injury, upon grounds and causes of actions separate and distinct from those upon which its co-defendants are sought to be held liable.

It is alleged in plaintiff's complaint as negligence, as follows:

Par. 9. "It is shown that the defendant, Cox, was conductor of No. 81, and had entire charge of said crew, the defendant, Voils, was the engineer thereof, and the defendant, Ed. Hurst, was the
37 front brakeman or flagman on said No. 81, and that each and all of said individual defendants represented the defendant railway company in the operation of train No. 81, and in the placing of train No. 81, on the side track at said point, and in the leaving open of said switch at said point.

Par. 10. "It is shown to the Court, that it was the duty of all the defendants hereto, with reference to plaintiff and his said train, to have said switch turned so as to keep plaintiff's train on the main line. It is alleged that the individual defendants hereto, constituted the crew of said train No. 81, and each and all of said individual defendants, representing the defendant railway company, participated in the turning wrong of said switch, and after turning it wrong, negligently permitted it to stay turned away from the main line.

Par. 11. "It is shown to the Court that said switch was turned to said siding by said Hurst, the brakeman aforesaid, and No. 81 went into said siding, and said Hurst negligently failed to turn said switch back to the main line, as was his duty. It is alleged that the negligence of the said Hurst, and the negligence of the railway company (the said Hurst representing the railway company in this regard) concurred in the negligent turning and failing to turn back of said switch. It is further alleged that the said Cox, who represented the

said railway company in the control and management of said train, was under the duty to see that said switch was turned from
38 the main line, he being responsible for the proper turning of said switch, under the defendant railway's rule, customs and practices, and it is alleged that the said Cox negligently failed to look after said switch after No. 81 was in the siding, and negligently failed to turn it back to the main line, as was his duty. In these particulars the said Cox's negligence concurred with the negligence of the defendant railway company.

Par. 12. "It is alleged that the negligence of the defendant, Voils, concurred with the negligence of the defendant railway company, in that said Voils, as engineer, after his engine got into the siding, — the exercise of ordinary care, knew and must have known (as it was visible to him) that the switch was turned wrong, and to the main line, yet he failed to exercise ordinary care, to report the same to the other members of the crew, or to take any steps to have it turned right, as was his duty. In these particulars his negligence concurred with the negligence of the defendant railway company.

Par. 13. "It is alleged that it was negligence in said three individual defendants to unlock and cause to be unlocked said switch and cause the same to be turned to the main line, and their negligence was the negligence of the defendant railway company, inasmuch as they represented the railway company in the operation of said train No. 81, upon this occasion.

39 Par. 14. "It is alleged that it was negligent in the individual defendants hereto, not to discover that said switch was turned wrong, it being perfectly patent and visible that it was turned wrong, and in said failure to turn the same correctly to the main line the said three individual defendants represented the defendant railway Co., and their negligence was concurred.

Par. 15. "It is alleged that said three inndividual defendants, representing the said defendant railway, owed the plaintiff the duty to have said switch turned to the main line, under the defendant railway's rules and regulations, and under the exercise of ordinary care, and their negligence concurred with that of the defendant railway company.

Par 16. "It is further alleged that with said switch turned wrong, the individuals hereto, who were the members of the crew of No. 81, should have flagged the plaintiff's train, if for any reason the switch was to remain turned to the side track, and it is alleged that notice was given plaintiff that said switch was turned wrong, until plaintiff got to a point on the track where he could see it, which was a few rail lengths away, and not in time to escape, and in this negligence the individual defendants represented the defendant railway company, and the negligence of all concurred.

Paragraph VIII.

It is also sought to render this petitioner liable by reason
40 of the alleged negligence of co-employees and fellow servants of plaintiff, among them Ed. S. Hurst, Benjamin Voils and Tom Cox, petitioner's co-defendants.

Paragraph IX.

Your petitioner shows that it is sought to be held liable by reason of the alleged negligence of co-employees and fellow servants of plaintiff, under and by virtue of a certain statute of the State of Georgia, towit: Section 2323, of the Code of 1895, which reads as follows: "If the person injured is himself an employee of the company and the damage was caused by another employee and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."

Paragraph 10.

Your petitioner shows that it is sought to be held liable under said statute law of the State of Georgia, which changes the common law rule of liability of the master for injuries caused to its servant by negligence of a fellow servant.

Paragraph XI.

Your petitioner shows therefore that the controversies between plaintiff and this defendant are seperable and distinct from those between plaintiff and Ed. S. Hurst, Benjamin Voils and Tom Cox, its co-defendants. Said Hurst, Voils and Cox are sought to be held liable for said acts of negligence as heretofore set out
41 under the principles of the common law, unchanged by the constitution of this State, or by statute thereof. Whereas petitioner is sought to be held liable in consequence of the statute above quoted which is not applicable to the co-defendants.

Paragraph XII.

That therefore, the grounds upon which said Hurst, Voils and Cox are sought to be held liable and the grounds upon which your petitioner is sought to be held liable, constitute seperable and distinct controversies and separate and distinct causes of action.

Paragraph XIII.

Your petitioner shows that therefore the controversies between it and plaintiff being seperable and distinct from those between it and the other mentioned co-defendants that the same can be fully tried and determined between the two, plaintiff, and this, your petitioner.

Paragraph XIV.

Your petitioner further shows that the controversies between your petitioner and plaintiff are monetary in character, and the sum involved and in controversy therein, exclusive of interest and cost, exceeds the sum of $2000.00, and is the sum of $20,000.00.

Paragraph XV.

That your petitioner desires to remove this suit before trial thereof, and to remove the same into the next United States Circuit

Court, to be held in and for the Northern District of Geor-
42 gia; and your petitioner hereby brings J. W. English, of the County of Fulton and State of Georgia, as its surety, for its entering into the Circuit Court of the U. S. for the Northern District of the State of Georgia, on the first day of its next session, or before, a copy of the record in said suit, and for paying all costs that may be awarded by the said Circuit Court of the U. S., if said court shall hold that this suit was wrongfully and improperly removed thereto; and also for its appearing and entering special bail in said suit, if special bail was originally required, and for its complying in all respects with the provisions of the laws of the United States in the premises regulating the removal of cause from the State Courts.

Paragraph XVI.

Your petitioner therefore prays that the said security and bond may be accepted; that this suit may be removed into the next Circuit Court of the United States to be held in the Northern District of Georgia, pursuant to the statutes of the United Sates in such cases made and provided, and that no further proceedings may be had therein in this court, and your petitioner will ever pray.

Paragraph XVII.

Your petitioner further shows that its appearance through its attorney to remove this suit, is a special appearance, and does not waive its objections to the jurisdiction of the court, it being solely for the purpose of removal of said suit to the Circuit Court
43 of the United States for the Northern District of Georgia.

JNO. J. STRICKLAND,
Petitioner's Attorney.

STATE OF GEORGIA, *Fulton County:*

Personally came before me, F. J. Eyler, who, being duly sworn deposed and said that he is the Superintendent of defendant, the Southern Railway Company, petitioner in the foregoing petition for removal; that affiant knows the contents of said petition, having read the same, and said petition is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Affiant further says that he is a general officer of the defendant, the So. Ry. Co. and he is one of the highest officers of said defendant in the State of Georgia, and is authorized to verify the foregoing petition.

F. J. EYLER.

Sworn to and subscribed before me, this 14th day of May, 1906.

W. C. LEWIS,
Notary Public, Fulton Co., Ga.

In the City Court of Hall County, State of Georgia.

WM. M. MILLER
vs.
SOUTHERN RWY. COMPANY et al.

Petition to Remove Case to the United States Circuit Court for the Northern District of Georgia from the City Court of Hall, Hall County, Georgia.

44 Know all men by these presents, that we, the Southern Railway Company, as principal, and J. W. English, as surety, are held and firmly bound unto Wm. M. Miller in the penal sum of One Thousand Dollars, for the payment of which well and truly to be made unto the said Wm. M. Miller, his representatives and assigns, and all others whom it may concern, we bind ourselves, our heirs, our representatives, successors and assigns, jointly and severally, by these presents.

Whereas, the Southern Railway Company has filed its petition in the City Court of Hall, Hall County, asking for the removal to the Circuit Court of the United States for the Northern District of Georgia, of a certain cause therein pending, wherein said Wm. M. Miller is plaintiff and the Southern Railway Company and Ed. S. Hurst, Ben Voils and Tom Cox, defendants.

Now, the conditions of the above obligations are such, that if the said Southern Railway Company shall enter in to the said Circuit Court of the United States for the Northern District of Georgia, aforesaid, on the first day of its next session or before, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said court, if said court shall hold that said suit was improperly removed thereto, and shall make special bail if originally required, and shall do and perform all acts required by the laws of the United States to be done by it in the re-
45 moval of said suit as aforesaid, then this obligation to be void; otherwise to remain in full force and effect.

In testimony whereof we have hereunto set our hands and affixed our seals this 14th day of May, 1906.

SOUTHERN RAILWAY COMPANY,
By JNO. J. STRICKLAND, *Att'y.* [L. S.]
J. W. ENGLISH, *Surety.* [L. S.]

Executed, acknowledged and subscribed before me, this 14th day of May, 1906.

W. C. LANIER,
Notary Public, Fulton Co., Ga.

STATE OF GEORGIA, *Fulton County:*

In person appeared before me, W. C. Lanier, a notary public in and for said county, J. W. English, who on oath says that he is a resident of Fulton County, and said State; that he is a freeholder

therein, and is worth more than one thousand dollars (over and above all exemptions and claims of every kind) subject to the foregoing execution.

J. W. ENGLISH.

Sworn to and subscribed before me, this 14th day of May, 1906.

W. C. LANIER,
Notary Public, Fulton County, Ga.

46 STATE OF GEORGIA, *Hall County:*

W. M. MILLER, Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY, Defendant.

The defendant, the Southern Railway Company, being the petitioner in the foregoing petition for the removal of the cause aforesaid, having within the time provided by law filed its petition for the removal of the cause to the Circuit Court of the United States for the Northern District of Georgia, and having at the same time offered its bond in the sum of one thousand dollars, with J. W. English, good and sufficient surety, pursuant to the statutes and conditions according to law:

Now, therefore the court does hereby accept and approve said bond and accept said petition, and does order that the same remain filed with the clerk of this court, and it is ordered that this cause be not removed, but the motion overruled.

By the Court:

G. H. PRIOR,
Judge C. C. H. C.

May 25, 1906.

Filed in office, May 15th, 1906.

W. B. SMITH, *Clerk.*

47 Hall City Court, May Term, 1906.

No. 8-136.

W. M. MILLER
vs.
So. Ry. Co. and Ed. S. Hurst, Benjamin Voils, and Tom Cox.

Suit for Damages.

Now comes the Southern Railway Company, Ed. S. Hurst, Benjamin Voils and Tom Cox, and without waiving the demurrer already filed, nor the plea in bar already filed, but insisting upon both, and answer the several paragraphs of plaintiff's petition separately as follows:

1. This is admitted.
2. This is denied.
3. Defendants admit that plaintiff was in the employment of the defendant, the So. Ry. Co., as charged, and that he was engineer running train No. 72. They can not admit nor deny the remainder of the paragraph for the want of information.
4. Defendants can neither admit nor deny this for the want of information.
5. Defendants can neither admit nor deny this for the want of information.
6. Defendant denies this paragraph.
7. Defendant can neither admit nor deny this for the want of information.
8. Defendant denies the allegations in this paragraph.
9. This is denied as alleged.
10. This is denied.
11. This is denied.
48 12. This is denied.
13. This is denied.
14. This is denied.
15. This is denied.
16. This is denied.
17. This is denied.
18. This is denied.

Of all which it puts itself upon the country.

JNO. J. STRICKLAND,
ED. QUILLIAN,
Defendant's Attorneys.

Filed in office and docketed May 16th, 1907.

W. B. SMITH, *Clerk.*

GEORGIA, *Hall County:*

Be it remembered, that to the May term, 1906, of the City Court of Hall County, W. M. Miller brought his suit against the Southern Railway Company Ed. S. Hurst, Benjamin Voils and Tom Cox, for damages; that before the appearance docket was called the Southern Railway Company filed a motion to remove said case into the United States Circuit Court for the Northern District of Georgia; said motion was overruled and the case was carried to the Supreme Court, and transferred from that to the Court of Appeals, where the same was heard, and the judgment of the court below affirmed.

Before the remittitur was returned and made the judgment
49 of the court, E. S. Hurst, Benjamin Voils and Tom Cox filed, on May 16, 1907, their demurrer to the petition in said case as follows:

Hall City Court, May Term, 1906.

No. 8-136.

W. M. MILLER
vs.
So. Ry. Co. and Ed. S. Hurst, Benj. Voils, and Tom Cox.

Suit for Damages.

Now comes the Southern Railway Company, Ed. S. Hurst, Benjamin Voils and Tom Cox, the defendants in the above stated case, on the first day of the first term, and without waiving the plea in bar filed, demur to said petition and says the same is not good in law for the following reasons.

1. The petition is not good as a joint action against all these defendants for the reason that there is no joint act charged in the declaration participated in by all the defendants, either as an overt act, or in any other way.

2. It is not good as a joint action for the reason that the plaintiff's right of action as against the So. Ry. Co., is statutory, authorizing him if free from fault to recover for the negligence of a fellow servant; whereas his rights, if any against the other defendants, is common law, and the two remedies can not be combined in this way.

3. There is no act alleged against either of the defendants which amounts to an act of misfeasance. The only acts charged against the defendants, other than the So. Ry. Co., being that of negligence as employees of said Southern Railway Co.

4. There is no allegation showing that these defendants, other than the Southern Railway Company, in the act of negligence charged, was guilty thereof, in consequence of any concert of action between them and the So. Ry. Co., or that their act of negligence was known to the So. Ry. Co., or directed by it, or ratified by it.

5. There is no cause of action set out in the petition.

6. Defendants demur especially to that part of paragraph 18, which alleges that the engine of train No. 81 had been left too close to the track, for the reason that he does not allege how close it was left.

Wherefore the defendants pray that this, their demurrer be sustained, and the suit be dismissed.

JNO. J. STRICKLAND,
ED. QUILLIAN,
D'ft's Att'ys.

Upon considering this demurrer the same is overruled. This May 23, 1907.

J. C. BOONE,
Judge C. C. H. C.

On the 23rd of May, 1907, the Hon. J. C. Boone, judge, overruled said demurrer in words as follows:

"Upon considering this demurrer the same is overruled. This May 23, 1907.

J. C. BOONE,
Judge C. C. H. C."

51 Now within sixty days after the passing of said order overruling said demurrer, comes Ed. S. Hurst, Benjamin Voils and Tom Cox, and excepts thereto, and thereupon says that the court erred in overruling the demurrer upon each of the grounds therein set out.

Wherefore they pray that this, their exception pendente lite be certified and entered on the minutes and become a part of the record, as provided by statute.

JNO. J. STRICKLAND,
Attorney for Ed. S. Hurst, B. Voils, and Tom Cox.

The recitals of fact in the foregoing exceptions are true, the exceptions are allowed and ordered recorded on the minutes and become part of the record in this case.

This May 30th, 1907.

J. C. BOONE,
Judge C. C. H. C.

GEORGIA, *Hall County:*

Be it remembered that on May 16, 1907, after the case of W. M. Miller vs. Southern Railway Company had been carried to the Supreme Court on a motion to remove filed by the Southern Railway Company, and before the remittitur of the Court of Appeals, which finally heard the same, was made the judgment of this court, the defendants, the Southern Railway Company, Ed. S. Hurst and Benjamin Voils and Tom Cox, filed a plea in the City Court
52 of Hall County as follows, to-wit:

Hall City Court, May Term, 1906.

No. 8-136.

W. M. MILLER
vs.
So. Ry. Co. and Ed. Hurst, Benjamin Voils, and Tom Cox.

Suit for Damages.

Now comes the Southern Railway Company, Ed. S. Hurst, Benjamin Voils and Tom Cox, the defendants in the above stated cause, and before pleading to the merits files this their plea in bar, and for grounds there- say:

Paragraph I.

That on the — day of ——, 190–, the said plaintiff, Wm. M. Miller, filed in the Superior Court of Hall, and against defendant,

the Southern Railway Company, a suit for the same cause of action. A copy of said petition being attached hereto.

Paragraph II.

This defendant, the Southern Railway Company, filed in said court a petition to remove said case into the United States Circuit Court for the Northern District of Georgia. Said petition being in regular form, with proper bond and security, and in every way complying with the statute, a copy of the same being attached.

Paragraph III.

On the 17th day of July, 1905, being before the time at which defendant was required to plead, said case, together with the cause of action was, under an Act of Congress, regularly removed
53 into the U. S. Circuit Court, for the Northern District of Georgia; the order transferring and removing said suit and cause of action being signed by the honorable J. J. Kimsey, Judge, on the — day of July, 1905. The Honorable J. J. Kimsey, Judge of said Superior Court thus adjudging that the jurisdiction of the State court over said case and cause of action should then cease, and the case and cause be transferred to the Federal Court.

Paragraph IV.

In pursuance to said order, a transcript of said case was filed in the Federal Court above referred to, before the first of October, 1905, and on the — day of September, 1905, the defendant, the Southern Railway Company, filed an answer to said case, thus pleading to the merits in said Federal Court. A certified copy of the entire proceedings being hereto attached as part of this plea.

Paragraph V.

On the — day of March, 1906, after the defendant, the Southern Railway Company, had plead, the said Wm. M. Miller, plaintiff, dismissed his suit in the said Federal Court.

Paragraph VI.

On the 12th of March, 1906, the said Wm. M. Miller again filed the same suit, for the same cause of action, in the City Court of Hall, but added Ed. S. Hurst, Benjamin Voils and Tom Cox as co-defendants.

54 Paragraph VII.

These defendants further show that the said Wm. M. Miller, before filing his suit the second time in the State court did not pay the cost that had accrued on the former suit, and for that reason was not entitled to recommence suit in any event.

Paragraph VII-.

These defendants allege that when the said case and cause of action was removed into the Federal Court as above stated, the

effect was to give that court jurisdiction of both, and while plaintiff could dismiss and begin anew in that court, he could not dismiss and begin anew in the State court, even by adding co-defendants; that the City Court of Hall, in consequence of these facts has no jurisdiction of the case, and even if it did, the same could not be filed again until the cost had been paid.

Wherefore, they pray that this, their plea in bar be sustained and said suit be dismissed and they have judgment for cost.

JNO. J. STRICKLAND,
ED. QUILLIAN,
Def'ts' Att'ys.

GEORGIA, *Hall County:*

You, Jno. J. Strickland, do swear that the Southern Railway Company is a non-resident corporation; that you are its attorney, and as such have had charge of the above stated case since the same was filed in the beginning, and that the statements of facts
55 in the foregoing plea are true, as stated, in so far as they come within your own knowledge, and so far as derived from the knowledge of others you believe them to be true, so help you God.

JNO. J. STRICKLAND.

Sworn to and subscribed before me, May 14, 1906.
JAMES F. FOSETER, *J. P.*

GEORGIA, *Hall County:*

To the Superior Court of said County:

The petition of William M. Miller shows to the court the following case:

(1)

The defendant is the Southern Railway Company, which is a railroad corporation, running a line of track in said county, and having an office and agent therein, on whom service of process can be made.

(2)

Said defendant has endamaged plaintiff in the sum of Twenty Thousand Dollars ($20,000.00) on account of the case hereinafter stated.

(3)

On the 17th day of June, 1904, plaintiff was in the defendant's employment as engineer on a freight train. On said June 17, 1905, plaintiff was going north on freight train No. 72. Upon leaving Atlanta, and at Armour's station, plaintiff received an order
56 to the effect that train No. 81 had the right of track over 72 between Lula and Suwanee. It is alleged, that under defendant's rules and regulations, the plaintiff's train No. 72 was a superior train to 81, the plaintiff's train being a second class train and No. 81 being a third class train, and moreover No. 72 being north bound, and No. 81 south bound. The order aforesaid there-

fore, gave the plaintiff the right to carry his train to the station of Suwanee.

(4)

Accordingly, the plaintiff proceeded to run to Suwanee, and when plaintiff got to Suwanee he received another order from the defendant's authorities, which directed him to meet No. 81 at Buford, further on the road, and under this order plaintiff proceeded with his train to Buford, where he was directed to meet No. 81.

(5)

When plaintiff got to Buford, as was his duty, he waited until further orders, and waiting something in the neighborhood of three hours, at which time he received another order from the defendant's authorities to the effect that No. 81 had been annulled between Flowery Branch and Armour's station. It is alleged that under the defendant's rules a train which was twelve hours late lost all its rights, and it is alleged that No. 81 was more than twelve hours late at all points north of Flowery Branch, and it is alleged that this order in thus annulling its rights below Flowery Branch effectually took 81 off of the road, and allowed plaintiff's train to
57 proceed upon its own rights, and to proceed as a superior train to No. 81, and without regard to No. 81.

(6)

Upon receiving this order plaintiff pulled out from Buford, and proceeded with due care to run to Flowery Branch. When Plaintiff got to Flowery Branch, and when he was about five rails away from the south switch at said point, plaintiff discovered (which is alleged to be the fact) that the switch was turned wrong, and from the main line, and so as to throw a train into the siding. Plaintiff immediately shut off his engine, and put his air into the emergency, which was all he could do, in as much as No. 81 was standing in the siding at this point, and to avoid being killed or mangled in the collission, plaintiff, in the exercise of due care, jumped from the engine, and in doing so was greatly and permanently injured.

(7)

The engine did collide on said side track.

(8)

The defendant, and its agents and servants other than plaintiff, were negligent in leaving said switch open, and in causing said wreck and collission. It is alleged that it was the duty of defendant with reference to plaintiff and his train, to have said switch turned so as to keep the train on the main line. It is alleged that
58 the defendant's employees, who constituted the crew of 81, and also the agent of said station, towit: Flowery Branch, turned said switch wrong, and after turning it wrong negligently permitted it to stay turned away from the main line. It is alleged

that it was negligent in the members of said crew to unlock said switch and turn it on the side track. It is alleged that it was negligent in the members of said crew, and in the agent at Flowery Branch, not to discover that said switch was turned wrong, it being perfectly patent and visible, and not to turn it right after having discovered it. It is alleged that defendant owed plaintiff the duty to have said switch turned to the main line. It is alleged that with the switch turned wrong, the members of the crew of 81 should have flagged plaintiff's train, if for any reason the switch could not be turned right. It is alleged that no notice was given plaintiff that said switch was turned wrong until he reached a point on the track where he could see it, which was about — rail lengths away.

(9)

Plaintiff was free from fault, and was running upon his rights, and in a manner and way that he had a right to run.

(10)

Plaintiff was permanently injured as follows: He was bruised injured and mashed in and about his head, neck, shoulders, body, back, abdomen and limbs. His right leg, ankle and knee, the right shoulder and muscles of the right arm, were all twisted, bruised and seriously injured. The bone in the right foot and ankle were
59 permanently dislocated and displaced. The knee joint was stretched and ruptured, and is much swollen. The ligaments, nerves and muscles of the ankle were torn. The right shoulder was stretched, and the muscles and nerves there were torn and stretched, as were likewise the muscles of the right arm. Plaintiff's capacity to labor and earn money has been totally destroyed. He will never be able to do railroad work again. The foot, knee, ankle and leg are stiff and weak, and he can not walk without assistance. The right shoulder and arm are weakened and he can not exert it without pain. He has suffered and will continue to suffer great pain. All time up to the filing of this petition has been lost. Doctor's and medical bills are $200. Plaintiff was earning from $150 to $200 per month. He was about 35 years of age, and had an expectancy in life of 31.00 years, during which time his capacity to labor and earn money has been destroyed. For each and all of the foregoing items of damage, plaintiff sues.

(11)

Plaintiff alleges that the emergency upon him when he jumped was great; that a collission was threatened, and actually did occur; that in the exercise of ordinary care it was necessary for him to jump to save his life or save great bodily injury, and that such emergency and threatened collision was brought about by defendant's negligence, it being further alleged that the crew of 81 had allowed the engine to stand too close to the switch, and it should have been further back in the siding.

60 Wherefore plaintiff prays process may issue, requiring de-

fendant to be and appear at the next term of this court, to answer plaintiff's complaint.

ARNOLD & ARNOLD,
ALONZO FIELD,
Plaintiff's Attorneys, Atlanta, Georgia.

Filed in office, May 13th, 1905.

W. B. SMITH, *C. S. C.*

STATE OF GEORGIA, *Hall County:*

W. M. MILLER
vs.
SOUTHERN RY. CO.

Complaint.

To the Sheriff of said County, Greeting:

The defendant, Southern Railway Company, is hereby required, personally or by attorney to be and appear at the next Superior Court to be held in and for said county, on the 3rd. Monday, in July next, then and there to answer the plaintiff's demand in an action of complaint. As in default thereof said court will proceed as to justice shall appertain.

Witness the Hon. J. J. Kimsey, Judge of said court, this 13th day of May, 1905.

W. B. SMITH, *Clerk.*

I have this day served the defendant, Southern Railway Company with a true copy of the within petition and process, by serving the same personally on F. N. Dobbs, the agent of said defendant company, at the office and place of business of said Southern Rail-
61 way Company, in Gainesville, Hall Co., Ga.

W. A. CROW, *Sheriff.*

This May 13, 1905.

In the Superior Court of Hall County, State of Georgia.

W. M. MILLER, Plaintiff,
vs.
SOUTHERN RWY. COMPANY, Defendant.

Petition for Removal to the Circuit Court of the United States for the Northern District of Georgia.

Your petitioner, the Southern Railway Company, respectfully shows to this Honorable Court:

1. That it is the defendant in the suit, which is of a civil nature and now pending; that said suit is brought to recover the sum of Twenty Thousand Dollars for personal injury.

2. Your petitioner further shows that said cause was instituted and begun in the Superior Court of Hall County by the plaintiff, the said cause being returnable to the July term, and that the time required for answering or pleading to the declaration or complaint of the plaintiff under the laws of Georgia and the rules of said court has not arrived.

3. Your petitioner further shows that this cause being of a civil nature, as aforesaid, is wholly between citizens of different States. Your petitioner, who was, at the time of the commencement of the suit, and still is, a corporate body corporated under the laws of Virginia, then and now a resident of the State of Virginia, and a non-
resident of the State of Georgia, and plaintiff, who was,
62 and still is a citizen of Georgia, as your petitioner avers.

4. Your petitioner further shows that the controversy between your petitioner and plaintiff is monetary in character, and the sum or value involved therein and in controversy therein, exclusive of interest and costs, exceeds the sum and value of $2,000, and is the sum of Twenty Thousand Dollars as aforesaid.

5. That your petitioner desires to remove this suit before the trial thereof and to remove same into the next Circuit Court of the United States to be held in the Northern District of Georgia; and your petitioner, hereby brings J. W. English of the County of Fulton State of Ga., as its surety for its entering into the Circuit Court of the United States for the Northern District of Georgia, on the first day of its next session, or before, a copy of the record in said suit, and for paying all costs that may be awarded by the said Circuit Court of the United States, if said court should hold that said suit was wrongfully and improperly removed thereto; and, also, for its appearing and entering special bail in said suit, if special bail was originally required therein, and for its complying in all respects, with the provisions of the laws of the United States in the premises, regulating the removal of causes from the State courts.

6. And your petitioner therefore prays that the said surety and bond may be accepted; that this suit may be removed into the
63 next Circuit Court of the United States, to be held in the Northern District of Georgia, pursuant to the statutes of the United States in such cases made and provided, and that no further proceedings may be had therein in this court; and your petitioner will ever pray.

7. Your petitioner further shows that its appearance, through its attorneys, to remove this suit, is a special appearance, and does not waive its objection to the jurisdiction of the court—it being solely for the purpose of removal to said Circuit Court of the United States for the Northern District of Georgia.

JNO. J. STRICKLAND,
Plaintiff's Attorney.

STATE OF GEORGIA, *Fulton County:*

Personally came before me J. S. B. Thompson, who being duly sworn deposes and says that he is the generally agent of defendant, the Southern Railway Company, petitioner in the foregoing petition

for removal; that affiant knows the contents of said petition, having read the same, and said petition is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Affiant further says that he is a general officer of the defendant, the Southern Railway Company, and is the highest officer of said defendant in the State of Georgia, and is authorized to verify the foregoing petition.

J. S. B. THOMPSON.

64 Sworn to and subscribed before me, this 5 day of June, 1905.

E. D. DUNCAN,
Notary Public, Fulton County, Georgia.

In the Superior Court of Hall County, State of Georgia.

WM. M. MILLER
vs.
So. RWY. COMPANY.

Petition to Remove Cause to the U. S. Circuit Court for the Northern District of Ga. from the Superior Court of Hall County, Ga.

Know all men by these presents, that we, the Southern Railway Company, as principal and J. W. English, as surety, are held and firmly bound unto W. M. Miller in the penal sum of one thousand dollars, for the payment of which well and truly to be made to the said Wm. M. Miller, his representatives and assigns, and all others whom it may concern, we bind ourselves, our heirs, our representatives, successors and assigns, jointly and severally by these presents.

Whereas, the Southern Railway Company has filed its petition in the Superior Court of Hall asking for the removal to the Circuit Court of the United States for the Northern District of Georgia, of a certain cause therein pending, wherein said Wm. M. Miller is plaintiff and the Southern Railway Company is defendant.

Now, the conditions of the above obligations are such, that if the said Southern Railway Company shall enter into the said Circuit Court of the United States for the Northern District of Georgia, aforesaid, on the first day of its next session, or before,
65 a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said court, if said court shall hold that said suit was improperly removed thereto, and shall make special bail if originally required, and shall do and perform all acts required by the laws of the United States to be done by it in the removal of said suit as aforesaid, then this obligation to be void; otherwise to remain in full force and effect.

In testimony whereof we have hereunto set our hands and affixed our seals, this 1st day of June, 1905.

SOUTHERN RAILWAY COMPANY,
By JNO. J. STRICKLAND. [SEAL.]
J. W. ENGLISH, *Surety.* [SEAL.]

Executed, acknowledged and subscribed before me, this 5th day of June, 1905.

W. C. LANIER,
Notary Pub., Fulton Co., Ga.

STATE OF GEORGIA,
Fulton County:

In person appeared before me W. C. Lanier, a notary public in and for said County of Fulton, who on oath says that he is a resident of Fulton County and said State; that he is a freeholder therein, and is worth more than one thousand dollars (over and above all exemptions and claims of every kind) subject to the foregoing execution.

J. W. ENGLISH.

Sworn to and subscribed before me, this 5th day of June, 1905.

W. C. LANIER,
Notary Public, Fulton Co., Ga.

Filed in office, this July 14th, 1905.

W. B. SMITH, *Clerk.*

66 STATE OF GEORGIA,
Hall County:

W. M. MILLER, Plaintiff,
vs.
SOUTHERN R'W'Y COMPANY, Defendant.

The defendant, the Southern Railway Company, being the petitioner in the foregoing petition for the removal of the cause aforesaid, having within the time provided by law filed its petition for the removal of this cause to the Circuit Court of the United States for the Northern District of Georgia, and having at the same time offered its bond in the sum of one thousand dollars, with J. W. English, good and sufficient surety, pursuant to the statutes and conditions according to law:

Now, therefore, this court does hereby accept and approve said bond and accept said petition, and does order that the same remain filed with the Clerk of this Court; and it is ordered that this cause be removed for trial to the next Circuit Court of the United States for the Northern District of Georgia, pursuant to the statutes of the United States, and that all proceedings of and in this court be stayed and suspended.

By the Court:

J. J. KIMSEY, *J. S. C.*

July 18, 1905.

STATE OF GEORGIA,
Hall County:

I, W. B. Smith, Clerk of the Superior Court of said county, do hereby certify that the foregoing egiht (8) pages contains a
67 true, correct and exact copy of all the proceedings in the case herein mentioned and stated in the said Superior Court of Hall County, Georgia.

Witness my official signature and the seal of said Superior Court, this July 17, 1905.

[SEAL.] W. B. SMITH,
Clerk Superior Court, Hall County, Georgia.

Filed in Clerk's office 22 day of July, 1905.
O. C. FULLER, *Clerk.*

In the United States Circuit Court for the Northern District of Georgia.

No. —.

Hall Superior Court, July Term, 1905.

WM. M. MILLER
vs.
SOUTHERN RAILWAY CO.

Now comes the Southern Railway Company, the defendant in the above stated case, on the first day of the first term, and answers the several paragraphs of plaintiff's petition as follows:

1. Defendant admits this.
2. Defendant denies this.
3. Defendant can neither admit nor deny this as alleged for the want of information.
4. Defendant can neither admit nor deny this for the want of information.
5. Defendant can neither admit nor deny this for the
68 want of information.
6. Defendant denies the allegations in this paragraph, as made.
7. Defendant admits this.
8. Defendant denies the allegations in this paragraph, as made.
9. Defendant denies the allegations in this paragraph.
10. Defendant denies the allegations in this paragraph.
11. Defendant denies the allegations in this paragraph.

Of all which it puts itself upon the country.

JNO. J. STRICKLAND, *Athens, Ga.;*
C. R. FAULKNER, *Belton, Ga.;*
ED. QUILLIAN, *Gainesville, Ga.,*
Attorneys for Defendant.

Filed in office and docketed, July 22nd, 1905.
O. C. FULLER, *Clerk.*

The within and foregoing case is on motion of plaintiff's attorneys voluntarily dismissed, with judgment against the plaintiff for costs. This April 18, 1906.

WM. T. NEWMAN,
U. S. Judge.

Filed in office, this 18th day of April, 1906.

O. C. FULLER, *Clerk,*
By J. D. STEWARD, *Deputy.*

Circuit Court of the United States, Northern District of Ga.

I, Olin C. Fuller, Clerk of the Court, do hereby certify that the foregoing and attached 9 pages of printing and writing are true, correct and complete transcript of the record and proceed-
69 ings had in the case of Wm. M. Miller vs. Southern Railway Company on file and remaining of record in the clerk's office of said court.

In testimony whereof I hereunto set my hand and the seal of said Circuit Court, at Atlanta, Ga., this 5th day of May, A. D. 1906.

[SEAL.] OLIN C. FULLER, *Clerk.*

UNITED STATES OF AMERICA,
Northern District of Georgia:

I, Wm. T. Newman, United States Judge for the Northern District of Georgia, do hereby certify that Olin C. Fuller, whose genuine signature is affixed to the foregoing certificate is, and was at the time of affixing the signature thereto, Clerk of the Circuit Court of the United States, in and for the Northern District of Georgia, duly appointed and qualified, that his acts and attestations given as such are entitled to full faith and credit, and that his certificate is in due form of law.

In witness whereof I hereunto set my hand, this the 5th day of May, A. D. 1906.

WM. T. NEWMAN,
United States Judge.

I, Olin C. Fuller, clerk of said court, do hereby certify that the Honorable Wm. T. Newman, whose genuine signature is subscribed to the foregoing certificate was, at the time of signing and attesting the same, United States Judge for the Northern District of Georgia, duly commissioned and qualified.

Witness my hand and the seal of said Circuit Court, this
70 5th day of May, 1906.

[SEAL.] OLIN C. FULLER, *Clerk.*

Clerk's Office, U. S. Circuit Court for the Northern District of Georgia. O. C. Fuller, Clerk.

ATLANTA, GA., *May 5th*, 1906.

Statement of Court Costs.

W. M. MILLER
vs.
SOUTHERN RAILWAY COMPANY.

Clerk's Costs	$11.25	
" " for Fi. Fa	1.25	
Att'y's docket fee, for def't's att'y	5.00	
		$17.50

Received from Southern Railway Company Twelve dollars and fifty cents, Clerk's costs in above stated case.

O. C. FULLER, *Clerk.*

A true statement, May 5th, 1906.

O. C. FULLER,
Clerk U. S. Circuit Court.

On the 23rd of May, 1907, upon said plea being considered, and counsel for both sides submitting the same to be passed on by the court without argument and without the intervention of a jury, the court passed the following order:

"Upon considering this plea it is adjudged that the same be overruled, the Court of Appeals having decided the questions therein made adversely to the plea in another case. This May 27, 1907.

J. C. BOONE,
Judge C. C. H. C."

Now, within sixty days from the time said order was passed overruling said plea, comes the defendants, the Southern Rail-
71 way Company, Ed. S. Hurst, Benjamin Voils and Tom Cox, and except thereto, and thereupon make the following assignment of error, towit:

The court erred in holding that said plea as set out, the facts of which were admitted to be true, did not constitute a good plea and defense in law.

Wherefore they pray that this, their exceptions pendente lite be certified and entered of record as required by law.

JNO. J. STRICKLAND,
Attorney for All the Defendants.

The recitals of fact in the foregoing exceptions are true.

It is ordered that the same be allowed and that they be entered

of record as required by statute that they may become a part of the record in this case. This May 30, 1907.

J. C. BOONE,
Judge C. C. H. C.

Hall City Court, May Term, 1907.

W. M. MILLER
vs.
SOUTHERN R'W'Y CO., E. S. HURST, BENJ. VOILS, and H. T. COX.

Suit for Personal Injuries.

W. M. MILLER, sworn, said:

I am the plaintiff in this case. On the 17th of June, 1904, I was in the employ of the Southern Railroad Company, in the
72 capacity of engineer. I was running a freight train. I ran from Atlanta to Greenville, S. C. I was forty years of age, I believe, at that time. At the time I was earning $75 a month running extra. I think when I got a regular run $150.00; that is from $75 to $150 per month. I had been running on the Southern road something a little better than three months. I had been an engineer between six and seven years. I had been a railroader twenty years all told—nineteen and a half years all told. Before I was an engineer I commenced on the section on the W. & A. road, fired awhile and run awhile; run there six years and a half I believe. On the 17th of June, 1904, I was running train they called 72, going north from Atlanta to Greenville. It was a regular train shown on time table. (Witness identifies the defendant's time table in force at the time under which he was running, and is the one took effect on May 29, 1904.)

All the rules on this table were in force at that time, including the time table. Train 72 was scheduled to leave Atlanta about twelve something. As a matter of fact my train left a little late. I disremember how much late, but I don't think it was but about twenty or thirty minutes. We left Armour's still later. I believe they call it six miles from Atlanta to Armour's. We run by telegraphic orders as well as by schedule; we run by the schedules aided by telegraphic orders. When we got to Armour's we were kept there because we had to pick up some more cars there; we
73 didn't have our full train out of Atlanta, and we had to get some at Armour's, and when I got down there we had to let first 36 pass—passenger train, and there were three sections that night of 36—two of them called peach trains; the first one was a regular passenger train; it come in from the yard as we call it now, only one spur built around Decatur street; then I pulled down to the main line, that is what we called the passenger main line, and stopped; 36 was due there; as soon as they passed I pulled out and took up that main line to let those two other 36's come out behind me pass, and they left and we got some more cars off of the house track and then we got ready and left there. 36 was north bound,

it passed us. 72 was a second class train. This train No. 81 is marked third class on the time table. The rule says that second class trains have the right over third class trains in any direction. We were north bound train. 81 was a south bound train. 72 had a right over 81 without any orders, on that time card. A north bound train has the right over a south bound train of the same class, I don't remember how long we were delayed at Armour's, I couldn't tell exactly, I suppose we were there about thirty minutes; we got orders there. We could have run out without any orders, we could have run without any regard to 81; it had to watch out and keep clear of us. (Witness identifies paper as order he got at Armour's, delivered by the defendant's operator there). That order required me to go to Suwanee, and stay there until further
74 orders, unless I stayed there until 81 was 12 hours late. (Witness reads the order):—Southern railway Co. Train order No. 4, June 17, No. 72 at Armour's station. No. 81 engine 278 has right over 72, engine 448 Lula to Suwanee. And this order was complete at 1.54 A. M. That gave us the right to run on our rights to Suwanee. At Suwanee we would have to stop and wait until we heard from 81, unless I stayed there until he became 12 hours late. When a train becomes 12 hours late as to what its rights are there are no rules at all; we can't run without special orders; they are dead, and we don't regard them at all; they have got to keep out of the way of everything. When I got to Suwanee I got another order. (Witness reads order No. 2) Southern Railway Co. Train order II, March 17, 1904, No. 72 Suwanee. No. 81 engine 278 gets this order at Buford, and will meet No. 72 engine 448 at Buford. And this was made complete at 5.39. That gave me a right to go to Buford to the first siding, because this second order was not annulled; he was a second class train from Lula to Suwanee, over me, on the first order. This second order put me third class from Suwanee to Buford and I had to take the side track and clear him at that place. When I got to Buford I took siding at the first side track; I cleared him; I was left in the siding there. 81 didn't come to Buford. I waited at Buford until way up in the day—at breakfast there. I judge I was there three hours. That delayed me on my schedule somewhere between four and five hours.
75 I got to Buford a little before day. I stayed there until after sun-up. After waiting there about three hours I got another order. (Witness identifies order. Southern Railway Co. Train No. 24, June 17, 1904. No. 72 Buford, Ga. No. 81 this day June 17 is annulled between Flowery Branch and Armour. Train made complete at 6.40 a. m. 81 became dead at Flowery Branch; what we call dead now is twelve hours late, at Flowery Branch. At 6.15 a. m. he was dead at Buford. At 6.57 a. m. three minutes on that I could leave there at seven o'clock; that is the variation of watches of standard rules. They gave me this order at 6.40, and they took 81's rights away from them, what they did have from Flowery Branch to Armour's. Of course it would only concern me up to Buford. The rules in that time card killed them at Flowery Branch. They died there at 6.15, at Flowery Branch, that is the schedule

on the time card. This order killed them below Flowery Branch. The rule having annulled them north of Flowery Branch and the order south of Flowery Branch, I didn't have to pay 81 on the track any regard at all; they were not on the road so far as I was concerned. They could not move from where they were without orders. Extras run by schedule and orders. I got this order at 6.40 at Buford. I left Buford at 6.41 or 6.42, I won't be positive which. Our minimum schedule time from Buford to Flowery Branch, I think, is 26 minutes, or twenty-seven—I mean 22. The minimum, the least time I can run it when on schedule, on time,
is 22 minutes. If I am not on time, the minimum I think
76 is 13 minutes; to some extent it is left to my discretion.
(Witness reads rule P.) "The speed of a train will, ordinarily, be that of its schedule, but in case of delay may be moderately increased as in the judgment of the engineer and conductor will be safe and prudent, due consideration always being given to condition of track and weather, and all the circumstances. The speed of extra trains, when not otherwise specified will conform to that of regular trains of similar lading." My minimum schedule was 22 minutes, provided I was on schedule time. If I was not on time I could increase that speed, if we didn't run at too reckless a speed. As to the time I got to Flowery Branch, I am pretty certain I hit him at 7:07; my judgment is that I struck this other man at 7:07; having left there at 6:41 or 6:42 and having struck him at 7:07, that would make 25 or 26 minutes that I would take for the run. My minimum there was 22 minutes, and I didn't get below it. On approaching Flowery Branch the minimum is just half that. The minimum time is 13 minutes, and the maximum time is 22 minutes. I run it in 25 minutes. Under the rule I could run it in thirteen minutes; if I was on schedule time I could run it in 22 minutes; if I was behind time I had a right to run it in thirteen minutes, and I did run it in 25 or 26. Approaching Flowery Branch it is a pretty steep grade, right smart. A curve has the effect of retarding speed, and is harder to get around than when
straight. It is harder to make a grade than where it is level.
77 With a grade and a curve both combined it is pretty hard to
get over. I had 35 or 36 loads on my train on that occasion; that is a pretty heavy train the way it pulled that engine. It is pretty hard to pull up the train there and get over that grade and over that hill to Flowery Branch with that train. In answer to the question where is the summit of the hill with reference to the switch point—where is the depot. Witness answer, right down the other side of the switch point, it turns over a little as you go to the switch point. With a train with 3 loaded cars, you would have to keep up your speed until at least half your train passed the summit of the hill. With reference to the summit of that hill at Flowery Branch, in order to get the train over it to the depot, I would have to work steam to the switch anyhow. As to the speed that I approached Flowery Branch, when I first seen the switch, in my judgment, I was not running over 17 or probably 18 miles an hour at the time. I stayed over there at Buford, as I said, some bit and

the negro lay down and went to sleep, and the fire had run together—I mean my fireman had gone to sleep, and the fire had run together, and the engine would not hold steam, and when I got over the hill this side of Buford about two and a half miles, and rolled all it would roll to get water and steam enough to go up the other hill. I was making steam while I was rolling. When I pulled the engine open she had 150 or 160 pounds of steam; she carried 180
78 pounds. As to the size of the engine pulling those cars, I don't know the size of the cylinders—I think 24 inch; not the weight and size of these largest road engines they now have. I would judge it could not pull as much tonnage; it is generally conceded that the biggest engines pull the most tonnage. I don't think I was running over 17 or 18 miles an hour when I first saw the switch. As I approached that switch I came at it from a pretty stiff curve, it threw me on the blind side; I came through a cut and curve; the effect of this on my view of the switch was that I couldn't see it nothing like as quick; I couldn't see the switch at all until my engine rounded the curve and got on a straight line at the switch. When I saw that the switch was wrong I don't believe I was six rail lengths—a rail is thirty feet—that is about 180 feet; I know I wasn't. As to the lookout I was keeping I was sitting in the window in this shape (showing); my face was looking on the outside of the cab, left hand upon the throttle, and was looking to see if they gave me the board for No. 17. I had no stop to make at Flowery Branch. As I rounded the curve the front end of the boiler cut off my view until it got nearly straight on the straight part of the track. I could have seen the switch target earlier if it had not been for that, but as it was I couldn't see it over five or six rails. It was a through freight. As to whether we had any work at Flowery Branch, I think the conductor told me we had two cars for Lula. I had no concern whatever for the station at Flowery Branch, if they give me the board nothing to do but go on.
79 So far as the main line is concerned switches are to be set and locked, not stand around them ten feet away. I did not have any concern with that switch—not a bit. I had the right of track over that switch, through that station. That train at that station had no rights at all against me; I didn't even know that he was there. I asked the conductor, I says "where is 81 by this time?" he says "broke down at Oakwood." Oakwood is north of Flowery Branch, 3½ miles I think it is. In my judgment, as an engineer, with the engine the size I had, it steaming as it was, with the number of loaded cars I had I don't think I could have gotten over the hill at all going at any less speed than I was going. With a train that size would have to have a pretty good start with that kind of a load, I judge 950 tons, to get over that. If an engineer stalled on that grade you would likely have to back down further and stall again as you come, or jerk out the draw heads. In my judgment the speed was not a bit more than was required to get over that hill. When I discovered the switch wrong the target was the first I discovered; I had my eyes set about the height of the target looking for the semiphore board; I was sitting this way looking out

the side of the cab, I was looking for the board and when I saw the target was set wrong seemed like I could not feel like and realize that the switch was set wrong, and I threw my eyes to that point to see the switch the second time, and I saw that I had to go into it.

I verified my first glance by looking out at the switch point;
80 that took some time; my engine was running all the time;

I saw that I was compelled to go into that side track; I slammed the steam off and grabbed the brake; I had to do it all with my left hand as the brake was kinder setting up this way, what they call half deck engine, the boiler runs half way back to the foot board. When I shut off the throttle I grabbed the brake and hollered, "look out, look out, my God, get off, get off." I would not swear positively that I got the air shut completely off. I don't remember whether I got the air completely in the emergency or not; I had no time to look and see. The fireman had his rake set up this way. I threw my hand right up that way and sprang right to the footboard, with one hand on the window sill of the cab, and as I reached the foot board I was going out on my side, the fireman was in my gangway, and the negro train hand was sitting on the fireman's box where he could have seen it earlier; as I threw myself to the foot board and got obstructed by the fireman, I just hollered to the negro standing in the gangway, I says get off, get off; the engine had turned the side track two rail lengths—it had passed the frog where I jumped off at two rail lengths in the siding. In answer to the question as to whether he jumped off after entering the siding, witness answers, I felt it when it hit the switch, and I thought it was going to turn over. As a matter of fact it didn't turn over. Part of the train entered the switch there that hit the

other engine; I think probably one or two cars turned over
81 up next to the engine, but I don't know whether it was my train or front end of 81; I was in no condition to go and see. In entering the switch before any collision occurred I could not swear about my engine jumping the track; my engine hit the other train face to face; my engine hit Mr. Voil's fact to face. When I jumped and hit the ground I hit on my right foot, hit on that right ankle, the joint I think is broke, or it deadened it right then, seemed like I just realized all the cars were coming right on me; there was a little bank on the side I jumped off, and I suppose higher than that is (referring to witness stand); that I went on my left knee and hands and got that far, and I got out where I supposed no cars would get on me and stopped; and when I hit the ground though on this foot it threw me right on my face (showing) this side, and threw my shoulder here against the cross ties and drove up that shoulder and wrenched my back so I couldn't hardly move; they came and carried me into Dr. Cobb's office or house. Mr. Tom Cox was conductor on that train 81, and Ben Voils was engineer; Ed Hurst was the front brakeman. As to whose duty it was to see that that switch was turned to the main line, they were all required to do it. The conductor has full charge of everybody on the train. Leaving out the rules it is the duty of the front brakeman to open and close the switches. In the rules it is the

engineer's duty when you back into a place to see that the switch is set and locked; that switch was certainly open; I have
82 realized it ever since. After they took me up and carried me to Dr. Cobb's office I remained there until 39 came, and they got the wreck cleared; I remained in Cobb's house until 39 came, and two or three good brothers toted me and put me in a buggy and took me to the depot and toted me in the train; Mr. Cox stayed with me all the time, and carried me home and helped my wife put me in the house. This was in Hall county, at Flowery Branch. When I got home I went to bed; I was in bed the principal part of the time for two weeks. Dr. Hancock came to my house, I suppose a couple of hours after I got home; it was about nine o'clock; we got home a little before sundown; he came out there about night and done up my foot in plaster of paris; plaster paris is a kind of powdered stuff that they wet up and put around your joints, it becomes hard; it made a cast that holds the bone, he put it around my foot from here down to there; it stayed in that ten days; I got a little easy about one o'clock that night and slept a little, an hour or so; hadn't slept any the night before. Dr. Hancock did nothing in the way of preparing for an operation. He said it was a bad bruise and would be all right in a few days, and gave me a little linament now and then to rub it with, after he had taken the plaster paris off. After I got out of bed I went on crutches; had to use them in walking; went on crutches between six and seven months; I went on both for five months, and went on one crutch and a stick for six or seven months; I had to do that because I could not walk without support; when I put that foot to the ground it hurts
83 so bad I could not put any weight on it. After seven months when I put the crutches away, in walking then I just hobbled along; I use my stick now in walking. My foot is in pretty bad shape, it really gives me more pain now than it did eighteen months ago. As to the motion I have got of the foot, I can use about that much that way (showing) I can't turn it sidewise; I can't turn it that way like I can this way; that is all I can turn it; and that gives me misery. As to the kind of brace I have to wear on it, I have got a leather on it. I have to keep that clamped around that joint, if I don't, it creens if I step on anything the least bit siding. I have to wear a rubber heel on this shoe. I have to wear a rubber heel so that I can step on something soft. The road furnished me an elastic but I couldn't wear it, the heel bone pressed up through and makes it sore. In answer to the question, if you didn't have on a rubber heel and had on a heel like this one, it would hit the floor, witness answers, it hits so hard it jars it hurts to step from the curb-stone down into the street; I could not stand on my foot with all my weight twenty minutes to save my life. It is very difficult for me to walk now. I can do any work that would allow me to set down where it is not too heavy. Besides being hurt in the foot I was hurt in the small of my back. It hurts considerably all the time. I can't lay on my back at all, when I happen to turn over it hurts me. As to the sort of wrench I got, it looked like

it sorter twisted me in two; my right kidney hurts me all the
84 time; sometimes now I don't make a cup full of water; it drove that shoulder up in there, hurt the muscles all in there. It was, I reckon about six or eight months that I couldn't get that shoulder, that arm I mean, up to my head, but later on I have got to where I can do it something like this, by pushing it a little; can't left anything with my right arm at all; I have not been able to run an engine since. I have never seen but very few days since but what I had the headache. In bad weather that eye hurts me right smartly. I can't use my arm to do any good much. I don't think I could climb up into the cab of these high engines. I-gettin- up with that foot it would hurt it a right smart; it would hurt it worse getting off than it would getting up; would probably have to step down on it and that would jar it and creen it. I have not been able to run an engine since. It was 18 months I never struck a lick of work at all. I was not able to, but at the end of 18 months I undertook to work the best I could; went to night watching at the Aragon hotel in Atlanta. They paid me $35 per month. I held that job five months, until I went to driving a buggy, putting oil in catch basins for the health department; that was done to keep the mosquitoes down. I did that six weeks. I got nine dollars a week for that work. I had a little boy to put the oil in the catch basins; I was just responsible for the work, and drove the buggy. As night watchman I didn't do any kind of physical labor when I first went there. I could go up and down in any part of the
85 building on the elevators; it was a six story building; I was required to look through the house every hour and see that there was no disturbance. I would go up to the sixth floor on the elevator and look around and then I would come down to the next story, and so on. I then would light the electric lights in the hall; and then I would go down to the baggage room and stay down there until 8.30. I had a chair to sit in to watch the servants go out, to watch the baggage room and keep the negroes from stealing, and then I would look around through the building the rest of the night. After I got through with that six weeks' job oiling the sewers I did nothing for a month or two. About two months I think before I went to doing anything. I went to work then at the American Canning Company, at the cutting press; I can sit and do that work. They have good stools there; I took mine and nailed a plank on the back of it. The press is turned or run by a treadle, like you would weave; put your material under the die and treadle with your foot. You can do that work with one foot; the weight of your foot will trip the majority of them. You have to touch your foot to it every time you cut a different piece. You take a piece of tin, you go across the tin twice. You trip the treadle once for every piece you cut out of that tin; you can do that with either foot; It don't require any pressure from the foot at all. The treadle is on the right side. I set there and put my left foot on it. It requires no effort except the weight of the foot. The treadle
86 is this way; it has got a flattened out place for your foot to set on and you can mash that all day long. As to wages I

got at that, it is piece work; I make about seven or eight dollars a week. When we work day work we get $1.50 a day. Nearly all the work is piece work. Average about $7.50 to $8.00 a week. Witness identifies Southern rule book containing the rules in force at that time. Photograph marked No. 1 exhibited to witness. This picture represents the lower end of the main line there. I was present when those pictures were made. This engine is headed south in the picture; that is looking from the way I was coming towards the depot. Witness identifies photograph marked two. This picture represents the principal part of the siding and main line below the depot down to the switch, so far as you can see around the curve looking south. This picture shows the siding that I entered; shows both sides. The track just west of the main line is on the passing track; that goes up next to the depot. There is another track going down (to) depot; it enters the main line at both ends. Out of that passing track and still further west, next to the depot there is another track called the house track. Engine *of* No. 81 as about the clear post there, about four rail lengths from the point of the switch. Photograph marked three exhibited to witness. This is away up there next to the depot, above the depot, takes in part of the depot and some cars on the track. It is looking south. Photograph marked four exhibited to witness. This represents
87 the main line and a little bit of the house track and passing track there, looking south. Tool house here at the switch. Photograph marked 5 exhibited to witness. This is looking in the same direction. That is looking the other direction taken before we got to the switch. That is looking north, the way I came into the switch. Photograph marked 6 exhibited to witness. This is a picture of the main passing track, and the main line, and the main line switch looking south. Dr. Hancock and Dr. Jarnigan both came out to see me. They did nothing at all as to an operation. They discussed an operation. Dr. Jarningham came to my house the second day after I was hurt. He is a railroad doctor. That is the only time Dr. Jarningham came. Dr. Hancock came five or six times. Dr. Hancock came first. The evening I got home Dr. Jarningham came out the next morning and saw my foot done up in plaster paris. I was lying on the veranda. I can't sleep at all on my right side; of course a man gets tired on one side. I have to sleep on my left side all I get. I had to give up my occupation as locomotive engineer for the balance of my days. I have had another physician to examine me, Drs. Hubbard and McDaniel. Dr. McDaniel went to Los Angeles, Cal., and I have not been able to get him here on the trial. Dr. Hubbard is present here in court. There has been four or five different pictures together X rays of both feet. Dr. Jarnigan took an X ray, and so did Dr. Hubbard.

I don't remember exactly the date when Dr. McDaniel
88 treated me; I suppose about ten months after I got hurt. He treated me up until he went off to Los Angeles. He has been gone about 12 months. Dr. Hubbard began treating me at the same time. They are not partners in business. How I come to get both of them, Mr. Arnold said get Dr. Hubbard. Dr. McDaniel was my

family physician. Mr. Arnold suggested Dr. Hubbard. These pictures I judge are about as good pictures as you can take of a track—those two lines look like two rails; the rails don't look like they run together there; the rails are parallel, the same distance apart. The rails don't look as broad as that. I recognize them as rails. In answer to the question, but the rails look parallel to each other and they look like they are almost at right angles, the witness answers, no, if you hold it like the picture was taken. The track looks like that to me, the point I am speaking of the general view of the picture. In answer to the question, if it is not true that a photograph of a thing does not look like the thing itself, the witness answers, it looks a little bit broader. As to whether some things are narrowed and some broadened is according to the way you are standing taking them. You can make a thing look far or near, or broad or narrow; it makes mighty little difference I judge, as to how you stand; it would be such a little, at the same time you would know exactly what it was and the distance. I could not swear what makes these tracks look so much broader at the bottom of the picture. I don't say that it is a fact that the picture don't look like the thing. Witness iden-
89 tifies the main line, and the main passing track in the picture. The passing track runs right straight until it turns off here, but you can get sidewise and it will show a little broader down here. In other words, this is not, relative to the main line, quite like it is on that picture. There are three tracks there, counting the main line, side track and house track; I don't think your picture shows it right. When I came down the main line, I turned into the left side. Your picture shows the picture on the left hand side of the main line coming yonder. Looking at the picture that way, that represents it now, my understanding, at the upper end. I am at the north end you see. I was coming from Atlanta towards north. The switch signal, I suppose is located about there, the way you have got it on your map. That switch signal, I would judge, is about 15 feet high. *I* switch signal is a piece of sheet iron cut out and put up there, red and white; when it is red it signifies that you have got to go into the siding; the danger signal means stop; it was turned red that day, and meant stop, of course. In point of fact when I reached Flowery Branch No. 81 was in the siding. I ran into the siding; part of 81 was on one track and part on another track; part was on one side track and part on another side track, it was therefore out of my way, it was off of the main line. So far as any orders were concerned or information by the defendant is concerned that played no part, not a bit in my movement; 81 was dead and was retired from the
90 main line, it was not in my way one way or the other if the switch had been set; the switch got in my way, it is due to the switch; the main thing about the orders was simply this; the orders I had enabled me to leave Buford sooner than I would have left, and also annulled 81, and they gave me the right of way earlier against 81. When I got to Flowery Branch I had the right of way as against 81, if the switch had been right; if the switch had been right 81 would not have bothered me. The real trouble was that switch being set wrong, the rest of it had nothing, not a bit to do

with it. When I say I had 35 or 36 loads I mean loaded cars. I don't know what they were loaded with. The conductor told me I had, or was carrying 950 tons, I got two for Lula and *take* up nothing else. Rob Grogan was the conductor. The conductor is supposed to know what the tonnage is. The engineer does not know. If he knows he has got over his tonnage he has got a kick coming. As you approach the switch at Flowery Branch the road curves to the left, as I came in towards the switch. I don't think it is but about 5 or 6 rail lengths, the best of my view there with my eyes, from the switch's point to where the curve begins; that curve is 40 rail lengths long to the best of my recollection; 40 or 42 rails is the length of the curve; that is the best of my knowledge now; I think it is 40 or 45 rails from where you cross the trestle down there—it was a trestle—it is filled in now, straight up that grade until you get to the curve. As you approach the point there,
91 the station—the switch board, signal board at Flowery Branch, I was looking outside, had my head out of the window on the right. I was looking for the semaphore board at the depot; the switch board was right straight between me and the semaphore board. It is 22 rail lengths from the switch board to the depot—30 feet lengths. Coming on the curve on the engine I don't think you can see that switch board at over six rail lengths south. I never tried it since I had this wreck. I have never come around there on an engine making a test, but standing on the ground making an observation I don't believe over six rails. I suppose there is a way it could be told, if a man was to get on an engine and look. When I saw the switch I don't think I was running exceeding 17 or 18 miles an hour; then I think I put on the emergency; my air was working; I had 35 or 36 cars—35 cars, 34 air, all air but one. A train in that condition is regarded in good condition—good air train. I was going to Oakwood for the Bell, if the switch had not been set wrong; that was where I had started. I was not going to stop at Flowery Branch; I had no business there. There was no use to check for it, if I got down somewhere I would stick there. I never did place myself there to watch the trains to see if any body stalled there at that hill. I had been running there about three months. In answer to question, nobody had ever stalled there so far as you know, witness answered, all the trains I run before were local trains. I was not checking for that station
92 no more than I was. I could have stopped easily if they had not given me the board before I got to the depot. In answer to the question, reading rule J., towit: "Freight trains must approach all stations, water tanks and coaling platforms under control. This does not mean that freight trains must necessarily stop, but they must approach stations water tanks and coaling platforms under control, and prepared to stop. This does not relieve flagmen from the proper performance of their duty." Your duty was to approach that under control, witness answers, I did; I could have stopped before I got to the depot. I could have went in there at a greater speed than I did and stopped before I got to the depot with the air brakes I had. After I put on the emergency and before

I struck the other train my train run, I should judge from the outside observation I could see afterwards, about six rail lengths, probably eight after I put on the emergency, if I got it on at all. I would not swear that I got it on at all. I jumped off two rails lengths before I hit the other engine. This is all I could see when I came up there later. I was in no condition to take measurements and see, I done very well to be toted into Dr. Cobb's office. When I jumped off I know I had done turned in the siding, from where Dr. Cobb showed me I had gone two rail lengths from the frog on the switch. The frog, you understand is where it leaves the main line. I made
an accident report to Mr. Colson. I don't think I made one
93 to the railroad superintendent. I have no remembrance now
that I made one. As to the distance you can stop a train running 17 or 18 miles an hour on a track like that and with your air working properly, depends considerable upon circumstances—you see it has something to do with the grade, and something to do with the rail, As to the train I had it is guess work to swear about that. The train I had and the grade I had to stop in, I could stop it running eighteen miles an hour in about ten or twelve rail lengths on that curve and that grade; the curve checks it; at the time I went into the switch I was still going up grade, back over the hill a little with the engine, the principal part of the engine was still on the grade, still helping me to check. With the train going up grade and still on a curve and the air in the emergency at that particular place with 35 or 36 cars, I could not say positively that I could stop back ten rail lengths—that is too much guess work—that is about 300 feet. When air is put on in emergency it has a pretty smart effect on — train, to slam the brakes on in the emergency it stops its mighty quick, jars up the train. You put on brakes in the emergency with the engineer's brake valve; the engineer does it from the engine; there was only one handle on that engine. If you want to use the air in ordinary use, that is done by the same brake valve, but there is emergency and surface application. In service application it has got a certain space to pull. The handle sets
like this; you throw it around; you pull it back that is in
94 running position; you pull it up about that far you get service application. Emergency is where you put on full power. From the time you put the emergency on until the effect is completely on the rear car, it is pretty quick; I couldn't swear positively about that. I have seen air put on twenty cars, it is mighty near all the same, of course it might be a second or two's difference, but mighty little. You can put emergency on anywhere if you pull the handle around. I don't know that it is safe to put it on on a curve. About whether there is any danger in it in putting on the emergency, there is danger of a freight train—passenger train to put brakes anywhere about one tight, put it in emergency. The danger is to the freight. I ran a passenger train a little on the W. & A. road, I never had a regular job; I run some extra, and I fired a passenger train there 18 months. I don't know that I ever made a test in my life as to the time the emergency will stop a train. In answer to question, you swore as an expert for Mr. Arnold in a case he had some time ago, I judge it would stop it, and didn't you swear

that in the examination, witness answers, I think it would. In answer to the question, didn't you also swear in that examination this, that they were running from 30 to 35 miles an hour and the emergency brakes were applied, witness says, I was not testifying in that 35 cars to the engine. I think I know what you are driving at now.

I did testify as an expert to the amount of cars that he had.

95 I suppose I did testify as an expert in that case. It was the case of Palmour against the Southern railroad. I suppose that is the case you have reference to. Another case, I don't know what case it was. I went to McDonough with Mr. Arnold. I testified as an expert as to the use of air, but that was a passenger train there. I testified as an expert if it is down there. I don't remember all I said. I also testified in the Palmour case as an expert, as to the use of air for Mr. Arnold's plaintiff. I don't know who set that switch wrong. I had no way to know that it was set wrong until I got in sight of it. I might run a stationary engine at a hotel or machine shop: I don't know, but I would have to set down; sometimes you would have to be on your feet nearly all the time (referring to stationary engine) I never did see a man that got as good salary there; there is considerable difference. I am not much experienced in stationary work from the fact I never run one, but I have heard them say they run from $55 to $60 a month. I have made as high as $150 to $180 a month. Stationary engineers I suppose get no more than one third; it does not take the same skill; it does not take the same skill to run one engine as another; he has got no rules or train orders; it takes a man with skill to know train orders and rules. A man has got to know the mechanism of an engine to run a locomotive; also got to know the mechanism of a stationary engine. Nothing like as much work about a stationary engine as a locomotive. I never went to the engine room of

96 the Kimball or the Piedmont, but in the Aragon they have two little wash pots and don't pay but $15 or $20 a week for it. The reason they pay so much for locomotive engineers is because his life is at stake; it is more of a trade; stationary is not so much. The capacity of the engine that I was running at the time this accident happened was 950 tonnage so they told me. He told me he had his full tonnage. It was a second class freight train on the schedules. I don't know what a carded train is; I know that it was a through train, and was running with his full tonnage, that is what the conductor said, I only have his word for it, I have no other way of knowing. To the best of my knowledge I was 40 years old when this accident happened. I was born Nov. 10, 1863. I suppose the statement in the petition that my age was 35 was a mistake, according to what my mother's bible is. The injury to my ankle was treated first by Dr. Hancock. He never did dismiss me. As before stated Dr. Hancock came to my house the day I got hurt, and Jarnigan came the next day; and Hancock came then every day for a couple of weeks, and I got to hobbling around on crutches and he kept on after me to come up to his office; it was in the English American building. I got on my crutches and hobbled up there. I remember going on the car, I had mighty near as much walking

to do going on the car as I did on my crutches; so I went up there then several times; every time I would go in, after he treated me a little while, would give me a little liniment and say, Miller you will get all right, take it easy; I said it would be some time. Finally he didn't do nothing at all. Dr. Jarnigan's office was in
97 the adjoining room. I went to him and he fixed up a kinder salve and told me to take that and warm it as hot as I could bear it and rub it on as hard as I could bear it. At that time he got this elastic, and they tried to get one that laced up; they got one that I just pulled on; also got one I had to wear on my knee. and he fixed up some other ingredients to bathe my foot with, and he says if this don't cure it Miller dam-ed if the fire aint out. Dr. Hancock never did dismiss my case. Hancock saw me last the last time Jarnigan did, in Jarnigan's room, I can't state positively about that. I think it was months after I got hurt—nine or ten months—it was some bit. Hancock saw me before I sued the case. He never consulted me after I brought the case. Don't remember the date when I brought suit. Dr. Hancock examined my shoulder and said he couldn't see anything wrong, only bruised; nothing wrong with bone. Dr. Jarnigan took X ray pictures. Dr. Hubbard did not treat my shoulder as well as my foot. They just examined it and said they couldn't see anything wrong with it, just rupture of the muscles. I had never been hurt before. I never did run on the Central railroad. I run on the W. & A. comparatively none at all, had a collision over there. That collision was Oct. 24, in the fall before I had this one in the summer. I think it was Oct. 24, 1903. I got hurt here on 17 June, 1904. I quit running on the W. & A. on the 23 of Febr'y 1903. I didn't get hurt then to amount
98 to anything; got some little bruises jumping off, or getting knocked off. I had a collision and only laid off 28 days. I was on the engine. I started out the front window and when they hit I went in the ditch. As to the speed we were running at that time, I put in the statement running 30 miles an hour. They had a speed indicator on that engine, and it showed 27 miles an hour. I got a little bruise on my right hip is all I got hurt at all. I was laid off 28 days. I then went back to my run; didn't have any engine. $154.50 that is what my run made while I was off. How I come to quit a run that paid $150 and go to one at $75 was, they stopped my pay, that means stop work; I meant by that they discharged me. They discharged me the 6th of March, and I went to running on the R. & D. the 12th. I came in the 12th after notice of discharge the 6th of March.

As to why I was discharged, I didn't put coal enough on my engine to go to Rogers. The Southern road had a wreck at —— where they crossed the W. & A. when they were running the Southern trains there to Atlanta, and Dalton and Chattanooga, that was 38 miles, and didn't put coal enough on my engine to go to Rogers, and the superintendent had told me that the engineer was required to know that he had coal enough to go to the next coaling station from any point. They claimed that I ought to know that I had enough or didn't have enough. I just took my engine and went

around to the chute and got a little more. They said I
99 ought to go on; that is what they discharged me for. For getting coal to steam my engine down to Rogers. I was not discharged for any fault in running my train, or any collision. After I had that collision at Smyrna they took me back. I was not blamed for that in any way at all. That road says south bound trains have right of track over trains of same class. They took me back and paid me for my time. I was running on my own rights. I told them all I wanted was my lost time. I consider that I approached Flowery Branch under control. No rule in this book, as I understand the rules, states that I have got to be able to stop at a switch point. I was ready and prepared to stop by the time I got to the depot. At night red and white signals and in day time semaphore stands out, if that drops you go on, if he had held that out I could have stopped; I believe I could have stopped before I got to it. I know I could have stopped by the time I got to that arm. From that switch point to the station it is 22 rail lengths, the best of my judgment—660 feet. My engine collided with the other engine long before it got to the station. In giving the red signal or white signal, or the arm extending in the day time, has got nothing to do with the switch point, it bears no relation to it at all. It means if you drop the arm you have got a clear board, and can go on; it means you can't pass by this station unless the arm is dropped. It has got nothing to do with switches; the rules require that they should be set and locked. The operator at the station is
not required to know anything about switches as far as I
100 know, unless he happens to see one wrong, of course, it would be his duty to attend to it. In answer to the question, are you required to stop under this rule, it says not necessarily stop, or is there any other rule that requires you to stop before you get to the red board—I mean have you got to stop or can you blow for it running, witness answers, blow at him running, they generally give you the board without blowing for it, if the operator is alive to his business he can give me the board without my blowing. You blow for it running if you blow at all. This switch target was right in my line of vision when I was looking for the board. When I looked for one I would have had to see the other one. With this switch opened by No. 81 it was obstructing the main line, practically, when the switch was opened, that threw it in the side track and obstructed the main line. My rights were over that train. When that train obstructed the main line, I suppose the flagman or fireman would have to give me a signal to stop. I don't remember how far they would have to go from the engine to the flag, I don't recollect about that—I think it is fifteen telegraph poles, further if necessary in the winding up of the rule. No flag was given me nor any signal down the road that the main line was obstructed; the first thing I saw was the switch; I didn't see a soul of the crew until after I got hurt. As to the effect of the guage when you put it clean around, you call that swiping the guage. I don't
know whether I got it clean around or not. My intention
101 was to do it. I didn't take time to look the second time to see if I had done it. I don't recollect now that there are any

stations on the Southern where the sidings are a mile long. I suppose there are some where it is a half a mile long. At stations with long sidings when you come to that station for the board you have not got to pay any attention to the switch at the end of the siding, not as against inferior trains; you have got a right to that board, and if they don't give it to you, you have to stop there—the station where the board is placed—the board itself is the physical thing you pass, you can't go by that. That does not say how far from it, this side of it, you shall stop one way or the other. There is nothing in the rules that I ever heard of that says that. The plat exhibited, showing the curve going south looks straight to me; it shows comparatively no curve. Service application and emergency are all the same brake, and applied by the same thing, it is the way you put it on. The emergency application gets 60 pounds of air into the cylinder as quick as you jerk it on. Service application gives 40 pounds I think. You can stop a train considerably quicker if you are expecting to do it; when you are not expecting it bobs up all at once, and you really don't realize it. I took the second look. I first looked at the target and could hardly believe my eyes, and I looked at the switch point then.

I disremember now the steam pressure of the engine that
102 I was using at the time. I had not run it before. I think it was 180 pounds or probably 200. In answer to the question, I understand that you left the W. & A. road because you violated an order that had been given you by a superior officer, witness answers, I don't know whether you call it an officer. I said McCollum had told me in a conversation previous to that I was required—in other words, engineers were required to see that they had sufficient coal when they left to go to the next coaling station, but later he claimed that he mentioned it at Rogers. In answer to question, didn't you state that you went and got some coal when the fireman told you not to get some coal, witness says, he said I had enough and I told him I didn't, and I took the engine and went and got it; and that is what they discharged me for; discharged me for disobeying a verbal order; a verbal order of the man in charge. A moving train striking a dead train one that is still, I suppose would move it back a little further than it would if it was going in the direction of each other. I don't know how far my train moved train No. 81 when I struck it. This rule J, regarding freight trains, must approach all stations, I understand the approach of a station means approach at the depot wherever it is placed, and that you must not pass that if they hold the red board; it don't say anything about switches; approach at the depot must be under control. Any point on a line of siding anywhere is an approach. I had my train under control to stop at the station you don't have to keep
your train under control until you get to the station, that is
103 the way the rule reads. The red switch signal is to show you when the switch is set. The engineer is to see—the one that might come in at it; I happened to be that one that morning; that was a signal to me—a signal that I couldn't pass that switch—but there is no rule that says you have to be under control—that was a

signal to me not to pass it at that point. In answer to the question, you could not pass that switch, in order to observe that you have got to have your train under control, witness answers, no, sir. In answer to the question, observe that without your train under control, witness answers, I can observe the rule that is laid down there; I don't think it is the switch. When you see the switch target red that means stop; it does not mean stop before you get to the switch; when you see the red board, the switch target turned red, you try to stop if you can, that is what it means, but it ought not to be turned that way. In answer to the question, it means that the switch is either set for the main line or side track and that you must not go on until you stop and see, witness says, I don't say about that going on part. I don't understand that it means that you are to stop after you get to it. A red signal of any sort means to stop before you get to it. It is true that this signal was red. It meant that I was to stop without passing it. It was put up there for any one that might be coming down the track—any engineer who might be on that track. It showed red each way. In answer to the ques-
104 tion, and it was therefore a signal for you not to pass it, witness answers, I can't agree with you on the rule business—it was a signal. In answer to the question, it was a signal for you and you happened to be the man therefore who ought not to have passed that signal, witness says, I can't answer it that way; if I am going along as an engineer, and see a red signal of any sort, I would stop if it was given to me. In answer to the question, the signal put up by the railroad that you are working for, that is red you stop don't you, witness answers, if it is put up for that business. It is true that when you see a red signal put up at any point you take that as a danger signal and stop. If I had observed that signal that day and stopped before I got into the siding I don't suppose I would have got hurt. I blew for instructions from the conductor as to whether I should pass Flowery Branch that day and he gave me the high-ball to go to Oakwood; that was the rules, you was to get a signal to go on to the next station. I never did make any experiment at that point.

In answer to the question, you were asked the effect of the red signal on the switch, whether that didn't mean always to stop a train coming towards that switch—suppose you were back down there intending to enter on the switch, and that switch would have been thrown to enter it, it would have shown the red? witness answers, yes; in that event I would have to run in on a red light. The red light is nothing except a sign to show which way the switch
105 is turned—the operator has nothing to do with that—just shows that it is set for the side track instead of for the main line; the red shows that it is set for one track, and the white for another. The rule requires that main line switches stand set and fastened, when not in actual use. 81 had no rights, not a bit, under the rules and orders I had as to the main line at that point at that time. I saw no red light there at all; I saw the switch target. I couldn't say whether there was any red light there at all. At the time I don't suppose there was. When I saw the red target there I did all I could to stop as I said here before. I could not have done

any more. A red light *is* a switch target does not signify anything except the way the switch was turned.

I have done stated before that red is danger.

If you intend to go to the side track it does not mean danger then. The white light would mean danger then. Suppose some man rounded a curve and just jumped up on the track with a red light in ten feet of you, you could not have stopped then.

Plaintiff introduced Carlisle Mortality table showing expectancy of man 40 years of age to be 27.61 years, and showing present value of annuity of $1 at 40 years of age to be 10.292 at 7 per cent.

Plaintiff introduced in evidence the defendant's time table and list of special rules printed thereon, and in force at the time of the plaintiff's injury. Said time table showed that the schedule for train No. 72 was to leave Buford at 1.38 a. m., and reach
106 Flowery Branch at 2:00 a. m., and the distance between these two points was 6.7 miles, and that the minimum time allowed to make the distance between these two points was 13 minutes. The said time table also contained the following rule:

"All regular trains from Atlanta to Greenville have precedence over trains of the same class moving in the opposite direction unless otherwise specified."

Upon said time table, No. 72, north bound train was classified as a second class train. No. 81, south bound train, was classified as a third *calss* train. Said time table showed that No. 72 was bound from Atlanta to Greenville, its scheduled leaving time at Atlanta being 12:01 a. m., and its scheduled arriving time at Greenville being 10:05 a. m. Said time table further showed that train No. 81 was bound from Greenville to Atlanta, its leaving time at Greenville being 9:10 a. m., and its arriving time at Atlanta being 9:40 p. m. The arriving time of No. 81 at Flowery Branch was 6:15 p. m., and its arriving time at Buford was 6:57 p. m.

Special rule J upon said time table was as follows:

"Freight trains must approach all stations, water tanks and coaling platforms under control. This does not mean that freight trains must necessarily stop, but they must approach stations, water tanks and coaling platforms under control, and — prepared to stop. This does not relieve flagman from the proper performance of their duty."

Special rule P upon said time table reads as follows:

"The speed of a train will ordinarily be that of its schedule,
107 but in case of delay may be so moderately increased as in the judgment of the engineer and conductor will be safe and prudent, due consideration always being given to condition of track, and weather and all the circumstances. The speed of extra trains, when not otherwise specified, will conform to that of regular trains of similar lading.

Plaintiff introduced the following general rules contained in the defendant company's book of general rules in force at the time of said injury, towit:

"81. Trains of the first class are superior to those of the second;

trains of the second class are superior to those of the third, and so on. Extra trains are inferior to regular trains of whatever class. All trains in the directions specified in the time table, are superior to trains of the same class in the opposite direction."

"82. Regular trains twelve hours behind their schedule time lose both right and class, and can thereafter proceed only by train order."

"86. An inferior train must keep out of the way of a superior train."

"87. A train failing to clear the main track by the time required by rule, must be protected as provided in rule 99."

"88. At meeting points between trains of the same class the inferior train must clear the main track before the leaving time of the superior train and must pull into siding when practicable.
108 If necessary to back in, the train must first be protected as per rule 99 unless otherwise provided."

89. "At meeting points between trains of different classes, the inferior train must take the siding and clear the superior train at least 5 minutes, and must pull into the siding when practicable. If necessary to back in, the train must first be protected as per rule 99, unless otherwise provided. An inferior train must keep at least ten minutes off the time of a superior train in the same direction."

"99. When a train is stopped at an unusual point or is delayed at a regular stop over three minutes, or when it fails to make its schedule time, the flagman must immediately go back with danger signals to stop any train moving in the same direction. At a point one half of a mile (or 18 telegraph poles) from the rear of his train; he must place one torpedo on the rail on the engineman's side; he must then continue to back three fourths of a mile (or 27 telegraph poles) from the rear of his train and place two torpedoes on the rail, ten yards apart (one rail length), when he may return to a point one half of a mile (or 18 telegraph poles) from the rear of his train, and he must remain there until recalled; but if a passenger train is due in ten minutes, he must remain until it arrives. When he comes in, he will remove the torpedoes nearest the train, but the two torpedoes must be left on the rail as a caution signal to any following train. If the delay occurs upon single track, and it becomes necessary to protect the front of the train, or if any other
109 track is obstructed, the front brakeman must go forward and use the same precaution. If the front brakeman is unable to leave the train, the fireman must be sent in his place."

"201. For movements not provided for by time table, train orders will be issued by authority and over the signature of the superintendent. They must contain neither information nor instructions not essential to such movement. They must be brief and clear; in the prescribed form when applicable; and without erasure, alteration or interlineation."

Rule 8 on page 193. "Main line switches must stand set and fastened for main line at all times when not in use."

Rule 806 in reference to duties of switchmen. "They must keep the switches locked for the main track except when passing trains to or from another track."

Rules 367 and 368 in reference to duties of conductors:

"367. They will have charge of the trains to which they are assigned and all persons employed thereon. They are responsible for the safe and proper management of such trains, for the protection and care of passengers, baggage and freight, for a thorough performance of duty by the train employees, and for the observance and enforcement of all rules and orders relative thereto. They will report all violations of rules and neglect of duty by the train employees to the superintendent or train master, and in case of gross misconduct may, if necessary, suspend any such employee for
110 the rest of the trip, reporting such action by wire, and holding the train, should safety require it."

Rule 368. "Any failure on the part of the conductors to exercise proper control over the movements of their trains, or to report negligence or violation of duty of engineman, will be taken as proof of inefficiency. At the same time they must treat enginemen with consideration due to the importance of their duties and to their joint responsibility for the movement and safety of their trains, and must advise with them in all cases of doubt *of* difficulty."

Rule 502 in reference to duties of enginemen: "They are jointly responsible with the conductor for the movement and protection of their trains in accordance with the rules; and while they must obey all proper orders by the conductors or others, as provided by the rules, they are individually responsible for the observance of rules relative to their duties, and must decline to obey any order by the conductor or any other person which involves the violation of such rules, or peril to persons or property."

Plaintiff introduced the following special orders, the same being the ones referred to by the plaintiff in his testimony:

"Southern Railway Company. Train order No. 4. June 17, To No. 72 at Armour's station. No. 81 engine 278 has right over 72, engine 448 Lula to Suwanee. (Signed) J. F. S. Superintendent. Conductor Grogan, Train 72 made complete 1:54 a. m. Operator Galloway."

111 "Southern Railway Company. Train order H. March 17. 1904. No. 72 Suwanee. No. 81 engine 278 gets this order at Buford, and will meet No. 72 engine 448 at Buford. (Signed) J. F. S. Superintendent. Conductor Grogan, train 72, made complete at 3:39 a. m. Operator, Rhodes."

"Southern Railway Company. Train order No. 24, June 17, 1904. No. 72 Buford, Ga., No. 81 this day June 17 is annulled between Flowery Branch and Armour. (Signed) J. F. S. Superintendent. Conductor Grogan. Train 72 made complete 6:40 a. m. Operator, Cheney."

Plaintiff introduced in evidence pictures.

V. V. HUBBARD, sworn, said:

I am a physician and surgeon, practice in Atlanta. Have been practicing about fifteen years. I do a good deal of surgery. I lecture on Materia Medica. I know Mr. W. M. Miller, the plaintiff. I have examined him on several occasions to see what condition he was in. I have been observing his case about two years. He came

to me with a stiff ankle, somewhat swollen, and complained with a pain in it, limited motion of the joint, and looked like there had been crus-ing injury there of some kind, either of the ligaments or muscles, or possibly the bone, and didn't seem to improve. I gave him some liniment and told him to rub it with that; that was all there was to do, because he had been hurt a year before I saw him.

An X-ray was taken of it. Of course, that only shows the
112 bone. After so long after the accident I am not positive as to whether there was injury to one of the bones or not, but it looks to me like there was an injury to one of the small bones of the foot, the bone we call the astragula, and looks as though that bone had been crushed. There is a difference in the appearance of the two pictures. The ligaments have evidently been injured; there is some swelling in the joint yet, notwithstanding the fact that not using that foot as much as the other foot it would naturally be smaller; if you give it rest it is apt to get smaller; but notwithstanding the favoritism there is some slight swelling around the limb and ankle. As to the importance of the ligaments, they are very important; they connect the leg with the foot, these ligaments hold the two lower bones. Now this is Miller's foot (showing the jury with a skeleton of a man's foot), the part I have reference to is this point here, known as the astragula, this gives the foot this motion, and consequently if this bone is injured or crushed you have more or less stiffening. The injury is right in here (showing), and my opinion this part of the bone has been crushed, though that I will not be positive about, but anyhow there is now limited motion. So there is necessarily some stiffening there as a result of the injury. In any view of the case, there is obliged to be injury either to the bone or to the ligaments, one or the other, and I am inclined to think there

is both. If the injury is only to the ligaments it is very
113 serious. Of course, a man in walking has got to use his foot all the time; a sprain in the ankle joint is worse; an injury to these ligaments are going to limit its motion, and especially if they are ruptured; sometimes they are torn loose and you have complete rupture of the ligaments; but any injury of this character there is always more or less inflam-ation, and consequently you have more or less stiffness. Possibly the loss in here, (showing from skeleton) of sinovial fluid that keeps the joints greased; it is from what we call sinovial fluid, and is to oil the joint. Inflammation usually has the effect of destroying this sinovial fluid. There is no way of replacing it in a joint; sometimes nature possibly replaces it, and sometimes never. This stiffening, he has got a certain amount of motion, but not a normal amount. The lateral motion of the foot is limited more than the anterior posterior; he can't turn it as much this way as he can forwards. The foot can have rotary motion; that is limited in his foot. Ligaments attached to that and that joint below (showing) the ligaments attached here and attached to the astragula either ruptured and strained and limits the motion in that joint in that direction. An X ray does not show the ligaments; shows the bony structure. The foot is a very mean thing to treat. After you put a joint to rest, if it rests too long you will naturally have more or less stiffening, as a sprained ankle sometimes turns

out to be a very hard thing to ever cure, and it is due to the fact that you have got to put them to rest to prevent the in-
114 flam-ation, and if you put them to rest too long you always have stiffening. I don't see how an operation would do his foot any good, would make it worse. With ruptured ligaments it would not do any. With the bone crushed up there, the cartilaginous, the bone contracted and destroyed, I could not do any good for it. The cartilage is that smooth hard substance that the joint works on. Like biting off a chicken bone. That joint (showing) is called the ankle joint. With the functions of that joint impaired there and the foot stiffened the effect is that it prevents the motion and also produces tenderness when the feet is put on the ligaments; they haven't their normal strength. Of course the feet support the body. Wearing a rubber heel would be very little use to Mr. Miller, might take a little shock off of his foot. He wears a support around the ankle to keep it from turning one way or the other; that is about all that can be done as I saw. If Mr. Miller on the 17th of June, 1901, sprang from an engine running in the neighborhood of seventeen miles an hour and struck on that foot, that heel was disabled at the time, and that day or the next day the railway company's surgeon put the foot in plaster paris cast and kept it there one or two weeks and took it out, and he went on crutches unable to walk on that foot, and some six or seven months after that walked with a stick, until you saw him about two years ago, and remained in the condition I found him in ever since, I would attribute this to the injury. Taking Mr. Miller as a man forty years
115 old when the accident happened and three years nearly having elapsed, two years and eleven months since the injury, and his foot in the condition it now is, I don't think it likely he will ever recover entirely. In fact I doubt if he ever gets any better; he practically gets the result in three years. He might for a few minutes do hard labor with that foot, but I think his ankle would soon give out. As to his ability to run an engine—high monster engine that would require him to climb up and down the side of it, I don't think he could do that, the getting up and down is troublesome, more troublesome than walking, more or less strain. From his description about the wrench of his back, I will state he probably strained the muscles of his back. The spinal cord with reference to these ligaments is one little vertebra placed upon top of another, one united by cartilage between each ligament holding them together on each side, and one on top of the other makes what we call the spinal column. The strain is more or less pain thereafter. Where pains come after a wrench, I think it is more or less the ligaments. If that weakness has lasted for three years and he still feels it, he may get over that entirely and he may not. If it has lasted three years it is a little doubtful about him getting over it entirely. As to the condition of his shoulder joint and arm, whether that is bony or muscular, will state it is muscular. He is unable to get his arm up this way as far as possible. It might be due to
116 one of the ligaments under the arm. These injuries are about as serious as injuries to the bone; where you get around a joint I consider more difficult to treat than the fracture of the bone

in the shaft like this (showing). Compare the fracture of the shaft of the bones and ligaments of a joint it is more serious, I would rather have a fracture, because you nearly always get a complete cure, but if you get an injury around the joint you don't make any. You are mighty apt to have stiffness there for a long time. Nature does not entirely replace a ligament when it is ruptured. Another ligament can't grow back in place of that; the surface where it is ruptured may grow together. If that ligament shortens after it heals or comes together again, it has the effect on the joint of limiting the motion of the joint. I would not think this man is able now to perform the duties of a locomotive engineer. I don't think he would be so he could. He might climb up and down a few times, but I think he would find that ankle would give out on him. He is likely to get hurt again; he is likely to get in a strained position. I have some X ray pictures here taken just the other day. Here witness exhibited pictures to the jury. You see, gentlemen, this is the picture of the sound foot. Now you have to look at this closely to get any distinction. You see now here in the injured foot, you see the irregular surface, it would indicate that the bone seams had been crushed in the articular surface of this part of the
117 foot. If you get close to those two you can see the distinction. This is the bone in here; in my opinion that has been crushed (showing jury). The effect of striking on the heel would be to drive it up, in my opinion, it was a kinder of a crush of this bone.

The tendency of nature, as a rule, is to relieve any injury to the human body. An injury to the ankle is not an exception to that rule. Then how far nature may be able to overcome an injury is at times problematical, as a rule. It is also true that an ankle injured and not used becomes stiff; that use to a degree will overcome that stiffness, just depends, owing to how bad the injury is. After you decide to give rest, and extend it too far, then use, to some extent, may relieve the stiffness, but you have to commence with very moderate use. I stated to Mr. Arnold that Mr. Miller could not run a locomotive engine, and give as a reason his inability to get up and down. It is true that a man with one leg could run a locomotive engine, and they do do it frequently after he gets up. Miller could get up there with the foot he has got. After he got up there he could run it as good as he ever could, but the getting up and down endangers this joint; he strains his joint in getting up. I don't say he can't get up there once and get down. Using a stick I guess he could get up or down on an engine without putting any weight at all on that foot. I don't know about that stepping up and down, I should think it would be difficult. This foot beats
118 a peg leg; I had rather risk it. Sometimes the pain, the tenderness of an injured ankle will decrease with use. They will all decrease usually up to a certain point to where it don't get any better, and after three years I think it is doubtful. He uses it some; he uses it all he ought to use it. He has been using it some ever since I have been seeing him. I think when he first came to me he came on crutches. He has been growing some better since I saw him; but for the last five or six months I have noticed no dif-

ference. I can't say as to his back. In attempting to raise his arm I can tell a difference; you produce a muscular spasm. As to whether that would interfere with his using the throttle of an engine, I don't know how much power it would take in using a throttle; or whether it was lifting up above his head. I never saw the foot until about two years ago. I never treated him up to that time. Mr. Arnold sent Mr. Miller to see me, and I think Dr. McDaniel was with him. That was for this case. My treatment was to get the facts about his condition rather than to relieve any trouble I found. I think I prescribed him some liniment. What I was after was simply to get the facts, to find out his condition and know what it was and keep up with it. He asked me if there was anything I could do. I didn't see anything that I could do. I have rendered no bill for my services yet. I am called on to discharge these sort of duties a good many times. I see some cases where there is no
119 suit. I see more settled outside than in the court. I see a great many of these kind.

I have not seen as many as Dr. Jarnigan. I suppose they swear ten times to my once.

They are employed for the purpose, I suppose. I am not retained on the other side. I usually try to get on the right side, where the truth is. That is not always the side that calls me.

A great many of the surgeons in Atlanta are called on to testify in cases. A good many are called on outside of Atlanta. The railroad, I think, keeps railroad salaried surgeons.

They are, as a rule, experts on a case. The railroad physicians are sent, of course, to see anybody that is hurt. I went to see this man in the capacity of the other side.

I was present when this X ray was taken. I was there when the light was thrown on the foot. I didn't look at the florascope. To have looked through that would not have done me any good. The man that operated the machine could not have looked through and told any more than I could. I have used that machine before several times. I don't know how often, but frequently take pictures. I have used the machine often. They have a better tube now and do better work than they have in a long time.

120 Plaintiff introduced in evidence the Mortality and Annuity Tables in the 70th Georgia-Carlisle Tables.

Plaintiff closed for the present.

C. L. NEWTON, sworn, said:

I am the surveyor of this county. I made a sketch of the railroad's condition at Flowery Branch. Sketch of the place is exhibited to witness and identified by him. Witness identifies the line representing the main line, and the two lines representing the side tracks. There is no other track on the other side. These are the only tracks there. Witness identifies switch signal—switch target. The station is something like twenty or twenty five feet south of the crossing. From this switch down to the crossing is 824 feet. The station house is some 35 or 40 feet south of that; I never took that measurement. It is 251 feet from that switch point south to

where the curve begins. (Map is exhibited to witness) and the point down the track pointed out there, that you can see the switch board. On foot you can see it on ground in middle of the track. From that point down to that switch is about 500 feet and something. In answer to the question is it *is* 362 and 231, witness answers, yes. It is 593 feet. I made the observation. I could see it from that point. The degree in the curve there is about ten degrees
121 to every hundred feet; it is a moderate curve. I never took it further down. I don't know how far that curve goes. It is continually curving from there on some distance further back towards Atlanta. Attention of witness is called to road crossing at the station on map. The road crossing is on the north side of the depot.

A curvature to the 100 would make it a ten degree curve. A ten degree curve is considered a pretty heavy curve. A train coming around a curve like that up grade is considerable impeded—a curve I should think is additional. That up grade continues for a quarter or half mile, if I remember right. I have had no practical experience with running engines. Have just such as an average civil engineer would know about that. It looks like a train load—35 cars—950 tons would have to get considerable start to make that hill at all around those curves. On the west of the track—I mean the cut, the train comes out on that switch from the cut; behind that cut you could not see the switch at all. At a point down here about 590 feet away standing on the track you could see that switch target with no obstruction in your way. In answer to the question, take an engineer sitting on his engine, on the outside of his engine, on the outside of that curve, he could not see that until his engine righted itself, witness answers, he would not have to get clear. I hardly think he would have to get in five or six rail lengths of that switch before he could see it. The point I was at was in the
122 center of the track. You see he is on the right hand side. As to whether a part of the engine, the boiler head, was in his way, he is still wider than the boiler. If he was looking ordinarily out of the front window there, I don't know that the boiler head until it righted itself around that curve, would shut off the view. The boiler head is not as wide as the box he sits on. The fireman would have a better view than the engineer on the left. The front of the boiler would to a certain extent shut off the view there with that curve, with the engine fronting this way, until it righted itself. The engineer is out further than the end of the boiler. In answer to the question, the curve commences just 231 feet from the crossing, witness answers, I imagine, yes, from what I know of an engine he could see further down. I can't say how much further back he could see than 231 feet. I took the scale of the distance. This is supposed to show the siding as long as it relatively is. I put the rule to it in making the scale; scale is 200 feet to the inch; relatively that scale is correct. Here pictures exhibited to witness. I suppose this represents the side track, and that is the main line. Yes, that looks like it. In answer to question, beyond that curve and cut here you could not see of course, could you, witness answers, he was standing here on the side track; this photo-

graph must have been on the side track. The track the collision occurred on is pretty fairly represented in the picture; it looks all right. Don't pretend to say exactly where Mr. Miller was
123 with that engine on that occasion, that he could see the switch target. The station is away up yonder beyond the switch target. Close to 800 feet; nearly three hundred yards. After you pass the switch point, beyond I would say is up grade—if anything, it looks to me like it is up grade. I did not take an accurate observation. I don't recollect when you turn in that siding there is a drop off of 1 or 2 feet.

Defendant introduced in evidence rule 533 and rule 534, as follows:

"533. In approaching sidings and yards they must be especially careful as to the indication and position of all switches."

"534. They will be held accountable for passing a switch which is not in the position for them. The absence of switch lights should be taken as a danger signal in accordance with the general rules."

R. T. GROGAN, sworn, said:

On the 17th of June, 1904, I was employed by the Southern Railway Company as conductor. I was conductor on train No. 72, on which Mr. Miller was injured. Am not now in the employ of the road. At the time the train approached Flowery Branch, at the time this accident happened, I guess we were running about 40 miles an hour. We were running about 40 miles an hour. It was when the train stopped I first knew anything was wrong. The train went about three or four car lengths after the emergency brakes was put on, or whatever stopped it. I don't know where the engine
124 was when it stopped. I could not see it. I don't know whether or not the emergency brakes were on, only from the sudden stop, which indicated that it was. I could not tell when the brake was put on or nor when he hit. When the train checked—first checked up, I don't know where the engine was at that time. I could not see, I was in the caboose. W. H. Harris was an employee on the train. Mr. Miller was the engineer, and had a negro fireman and a negro brakeman. The fireman's name was Andrew Jenkins. I disremember now how much tonnage we had. I don't know how much I had. I remember the engine that we had. I think it pulled 950 tons. We were not pulling the capacity, we were running 100 tons light—850 tons. I have since been on a train that was used as a test train at the same place. I think we had 28 cars. The tonnage was 807 or 809 tons. I didn't see at what distance this switch signal could be seen by the engineer approaching. I rode on the caboose on that train. I didn't see that. At the time we undertook to make the test we tried to run just as fast as we could—about 35 or 40 miles —30 or 35. As to what happened when the test was made, the engineer tried to stop just as quick as he could, after he got in sight of the switch. At the time of the accident to Mr. Miller it was early in the morning; it was good weather. At the time we made this test it was good weather. The test we made was with same track I

guess. It was the same place where we made the test. The train that we made the test with was going in the same direction.
125 I know the character of the engine we used in making the test, it was the same class of engine I had with the other; the cargo was different. I don't know how much difference; we only had 28 cars. As to tons there were 41 tons difference. The test train was 41 tons lighter than the other one. There were 36 cars in the collision. There were eight cars less in the test. As to how far the train went in the test, after the emergency brakes were put on, before it stopped, I disremember, I don't know exactly how far it went. This little young Gaston was along, he measured it. F. B. Chatham was the engineer in charge of the test train; I was back on caboose.

It was 36 loads the day Miller was injured. 36 cars and 36 loads. I did not count the caboose. There were 37, to count the caboose. I was not paying any particular attention to the speed of the train. Didn't know any accident was going to happen; had no idea of it; nothing about the speed attracted my attention; one way or the other. We always did hit it pretty fast, to get up that hill there, around all those curves, got to hit to climb it. It is about half a mile or a quarter up grade. I never did have to double to make that hill, always struck it with enough speed to make it. The top of that grade is not about that switch point at Flowery Branch, it continues on beyond there; it is up grade clear to the top, and the other side of the top. To get by the top you have to work steam with that train; that was not the heavy size engine that we
126 had 270, we had 448, that was the heaviest. They have heavier engines now. In answer to the question, if 38 loads is about as heavy a train as you can carry, witness answers, I don't believe I have rode on a bigger train than that, not without I had more engines, not without I had a double header. There was nobody in my way at Flowery Branch. I had a clear right of track. Train 81 was supposed to be out of our way; we had an order that it was dead. They had no right to leave that switch open. That ought to have been closed to the main line. When you have superior right over another train at a station you are supposed to run to that station without any regard to that train at all. It is a fact that the only thing that could stop Mr. Miller would be the semaphore signal, he could not pass that; he had a right to run up to that and stop, but if they drop it he could pass by. But as long as that semaphore signal at the station stood out, Miller could run up within ten feet of it and stop. After Miller came in sight of that switch turned wrong, I don't know if he had any time to stop at all; I don't think he could have stopped after he came in sight of that switch turned wrong. Up to that time there was nothing to stop him, except the semaphore at the station; he was not to pay any regard to that switch at all, except if he saw it turned wrong. You run up to this semaphore and blow for signal, and you are still in motion, that is the practice. As a fact, they don't have to stop; you run on and blow for a signal in motion.

127 In the use of these signals, if turned red that signified to the engineer to stop; that was south of the station; that switch

signal with the red meant to the engineer to stop if he could, without going into the side track; meant to stop if he could before he got into the side track; that signal was standing red when I got up there; I couldn't see it from where I was. In answer to the question, he asked you about pulling the grade with that train, I will ask you whether or not with that speed an engineer can pull that grade up there, witness answers, he can stop at Flowery Branch—stop at the station; he can slow to three or four miles an hour and drag through there with the train we had. It was necessary that morning to go thirty miles an hour in order to get over that hill. This is necessary because we were going to Oakwood for 17—it was necessary to make it. In answer to the question, the question I ask you whether it was necessary to go that gait to pull the hill, witness answers, no sir, we could stop at the station and go over the hill. I just said you could pull the hill three or four miles an hour. It was not necessary to go 30 or 40 miles an hour to pull the hill, but then if you wanted to get up the hill that was the way you had to hit it—what I mean is if you want to drag along three or four miles an hour you could hit the town, but if you hit hard you would run them up there. What
he did in this case was to hit not so very hard. I never did
128 call 40 miles an hour very fast. As to whether that train was
under control at the time it approached this switch I don't know, only what the engineer says, he said he could have stopped it. As to what I know, I couldn't tell whether he could stop it or not, we hadn't tried it. I couldn't tell you exactly how far the train went down the siding before it struck the other train—81—not very far. I think they had the passenger full and partly doubled over on the house track, as well as I remember now.

In answer to the question Mr. Strickland asked you if you could have gone through three or four miles an hour—if you had gone through at three or four miles an hour you couldn't have made much speed? at a hill, witness answers, had to go through to get by the hill. It is proper for us to save all the time and make all the speed we can so long as we don't violate the rules. We were several hours behind time. Had to wait at Buford several hours. Under rule P read to witness "The speed of a train will ordinarily be that of its schedule, but in case of delay may be so moderately increased as in the judgment of the engineer and conductor will be safe and prudent, due consideration always being given to the condition of the track, and water and all the circumstances. The speed of extra trains when not otherwise specified will conform to that of regular trains of similar lading." Witness says its is true that the speed we
run is left entirely in the discretion of the engineer and con-
129 ductor; there is no limit to our speed at all; we could have
run 100 miles an hour if it had been safe. Miller did blow on the approach of that station and I did give him the high ball signal to go on. I was his superior officer.

Witness admits that rule 533 says that in approaching sidings and yards they must be especially careful as to the indication and position of all switches. In answer to the question as to the safety of a train at the approach of a siding what about it—you stated to

Mr. Arnold that you could run any speed you pleased where you could run in safety, witness answers, we didn't do it everywhere then except Buford, Buford only slow order. The rule just read says, approach all yard limits and sidings under perfect control, which means approach them under control, yard limits we just considered places like Lula and Toccoa. In approaching sidings and yards they must be especially careful as to the indication and position of all switches. This was a siding. Under this rule it was his duty to be careful in approaching that siding. What I understand to be careful means as to the indication and position of all switches. I don't know, I don't understand what they meant the engineer was to do.

I don't remember that these special rules here on the time card supercede all general rules, I could not say that. In approaching sidings and yards that means that it must be where there is a siding and yard both together, that is the way I understand it. If it
130 — just a siding that don't apply, because it says sidings and yard together. That little place has not got any yard limits, has got one at Lula, none at Gainesville. A man is especially careful if he is running at such speed that he can stop at the time he gets to the semaphore station, that is careful. I don't know anything about whether Miller could or could not on this except what he said. I am not an expert in running engine.

The thing is in approaching sidings and yards they must be especially careful as to the indication and position of all switches—this siding up there has got a switch. I don't know—I can't say that this siding up there is one of the sidings that this rule means. It is a siding where there is a switch—and this at a switch. In answer to the question, I will ask you whether or not that is one of the sidings indicated, witness answers, I can just tell you how we done. I don't know what this meant. Could not specially watch a switch until we got in sight of it.

ANDREW JENKINS, sworn, said:

I was fireman for Mr. Miller who was engineer, at the time he got hurt. I have been running on the train I suppose, about six or seven months; that was my first trip with Mr. Miller. As we approached the switch at Flowery Branch, the day of this accident, the train was running about 40 miles an hour. I was down firing when he hollered to me we were going in there, and I went
131 to his side and he went to mine, we swopped sides. I am unable to tell you how far it run before it hit.

I don't still work for the road. I am working now in Atlanta. I was down firing. I had been down firing a little bit—there is a little trestle before you get into Flowery Branch, I don't know the name of it, I got down there to put in a fire. That is between a quarter and a half mile below Flowery Branch. I was down there firing from that point until he hollered, look out Jenkins. I had been looking out before. At that time I didn't look into the fire and got up every second and how fast he was running. I got through putting in my fire before we got there, I was up raking my fire; that was when he hollered look out Jenkins; that is what I was

doing, raking the fire; I was raking it to make it steam better. In answer to question, if you had been running forty miles an hour, you would not want to rake it, witness answers, would want to keep it that way; it takes a good deal of speed to make that hill with all those curves. In answer to question, if you had been going on slower you could not have got through there, witness answers, I don't know sir, I try to keep it up; that is what I always do. In answer to question, nothing unusual about that speed at that place, witness says, don't always go that way; when we are behind time we move along pretty briskly. I don't remember exactly that I went to sleep at Buford in the side track. I had to clean my fire out, come
132 from Atlanta to Buford, is 37 miles. I don't suppose it was my business to keep up with the speed of the engine, it was the engineer's; I was not running the engine. I had been firing until the time I got up with the rake and was raking the fire. The engineer I suppose was paying a little more attention to the speed than I was. I suppose more likely to know more about it naturally. He was the first man discovered the switch set wrong. I was working there with the fire. We had the right of track there at Flowery Branch. My instructions was when I was not firing to keep a lookout in front of me. Before the occurrence happened I was firing. I would not say, for I don't know that the signal board up there at the depot was 100 feet away. We could not have easily stopped that train up on the grade by the time we got to the semaphore station. I do not know, seems that the engineer would know better than me. I don't remember whether the engineer blew for the signal from the conductor back there and got the high ball. In answer to question, if witness was not pretty nearly asleep on the whole trip, you could not be asleep. In answer to the question, every time you quit firing didn't you drop off to sleep and the front brakeman up there on your box, witness says, he was up there, but I was not asleep. I don't pretend to say that I know what speed that engine was running, about 40 miles an hour. We didn't have a speed meter on that engine. In answer to the question, going down that dip before you got to that grade do you know what speed he was
133 running—he got all the start he could on that dip, witness answers, he was running right along going down that dip; he was running not exactly the same speed all the way from Buford to Flowery Branch. As to whether it was down grade, witness says, it was what we call rip raps; the track we had between Buford and Flowery Branch was near about an average track. If my memory serves me right I think he got more speed going down that little slant. I couldn't say how fast he was running before then. In answer to question, how is it he run faster when he was up climbing a telegraph post, witness answers, that is what I am talking about; it is kinder rip raps until the last little dip we got, and he got up a little better speed. I don't know how far that dip is from where he struck the switch, may be between a quarter and a half, about a quarter it looks to me; he was making pretty good speed when he went down in that dip. In answer to question, go faster than he did when he struck the hill the other side, witness answers, I was

firing right along there; I was firing when this accident occurred—just beforehand. You don't fire more going down hill than up hill; wasn't working steam, I kept my fire livened up. I don't know how far it is from Buford to Flowery Branch. The card exhibited to witness shows from Buford to Flowery Branch six miles, which witness admits. I don't know what time we left Buford. The collision occurred at 7:10, so Mr. Miller says. I thought it was 7.20. In answer to the question, that would make it ten minutes
134 longer. Just six or seven miles and it took you from 6.40 to 7.10 or 7.20 to make it, running 30 or 40 miles an hour, witness answers, we was just going yonder way all the time.

William Teasley was on my engine seat, he was brakeman. I don't know where he is now.

Dr. THOMAS H. HANCOCK, sworn, said:

I am a physician and surgeon, and, as such, am in the employ of the Southern Railway Company. I have treated W. M. Miller for injury he received on the Southern railway. I have looked over report that I made out at the time—the first time I saw him was in June, 1904. He had a stove up ankle. As to any other injury, he had just a general shaking up; there was nothing else. No serious complaint. I think I put the ankle in plaster paris cast, don't remember exactly how long it stayed there; don't remember exactly how long I treated him; don't recollect when I saw him last; there was no other trouble then that was at all serious except the ankle; he didn't make any complaint of trouble of his shoulder or back; he made no complaint of either. He complained of having a bruised sprained ankle, and a general shaking-up, like a man that had gotten a fall. I have not seen his ankle in over two years. It was not well the last time I saw it, still some swelling there and some soreness. In answer to the question, in your opinion will that ankle entirely recover or not, witness answers, I thought so. I
135 didn't see any reason why it should not. I supposed it would have been all right before this; I haven't seen him in two years; I don't know the condition of his ankle now; I have not seen it since that time. In answer to the question, did you discharge him or did he quit coming to see you, witness answers, I think he got another physician is my recollection about it. Describing condition of the ankle witness says, it was a stove up ankle, he had either fallen or caught that ankle, I would judge from the ankle and the history he gave me of the accident. I suppose he got a hard fall on the ankle. I could not find any bones broken. I couldn't find any crushed bones. The ligaments of the ankle were sprained. The ligaments are either torn or stretched. They adjust themselves in time. As to how much time, that is according to the extent, sometimes you get a sprain and are liable to sprain it over; if it is stretched or sprained you can sprain it over again, and it is more easily sprained than if it had never been stretched. As to my opinion as to how long Mr. Miller should have possibly lay up from that ankle, will say, that when I first saw him I thought he would be off two or three months, but it didn't get well as quick

as I thought it ought; in several months afterwards I remember it hadn't gotten well, still some swelling, some soreness. From my knowledge when I then saw it I suppose it would have been several months then, possibly six or eight months from the time it was injured before it would be all right. At the expiration of six or
136 eight months I supposed it would be all right. After that I supposed he would be able to run a locomotive again. I didn't see anything in his condition to prevent him from doing it.

All sprains get well. Sprains do not remain permanently; sometimes it causes the ligaments and tissues to pull loose. It isn't a fact exactly that when the ligaments are pulled loose or ruptured they are always replaced. It is a fact that the ankle joint moves on a shaft. Ligaments is not muscle. A ligament is on the same order as a tendon. When those ligaments are ruptured or pulled loose they impair the efficiency of that joint. It takes longer for hard sprains to get well than a break. A fracture of a straight shaft is a break. The muscles around the ankle joint is difficult. In answer to the question, does every sprain get well, witness answers, in many cases. Dr. Jarnigan and myself did not contemplate an operation of some sort in this case. I don't recollect that. By a stove-up ankle I mean the heel bone strikes and mashes the bones up in there; that is frequently a very serious condition. It is a fact that the only real test of how an injury of this sort will turn out is the history of the case.

If I could see the ankle now I could tell whether or not it had recovered.

BENJAMIN VOILS, sworn, said:

137 I am one of the defendants in this case. I was engineer in charge of train 81 at the time this accident happened. Rufus Johnson was my fireman. He is not here, he is on the road. I think he is firing for Mr. Plant. Tom Cox was the conductor. F. B. Stark, flagman and E. S. Hurst brakeman. When train 72 came in sight or hearing I was at the telegraph office. I didn't exactly see it. The operator said 72 was coming and I remarked to the flagman and conductor everybody look out for signals; we didn't have any orders to leave there; but I didn't exactly see the train when it came in the side track. Don't know what speed it was running. In answer to question, what is that switch signal at the end of the switch put up there for, witness answers, the target is to indicate when it is set to the side track or main line. It is put there for the benefit of the train crew generally. When it is red it indicates that it stands for the siding; red means to an engineer approaching that he is going in the siding. The signal red in railroading is generally considered danger. At the office the semaphore signal means they have orders for you. Ordinarily means danger; danger signal means to stop. Reading rule 533 to witness in these words "In approaching sidings and yards they must be especially careful as to the indication and position of all switches," I will ask you whether or not that applies to this place where this siding and signal
138 was up, witness answers, I would think so. It reads all switches. This is a switch, that has always been my understanding of it. In answer to question, that special rule J,

"Freight trains must approach all stations, water tanks and coaling platforms under control, what do you understand that to mean, under control? witness answers, approach them prepared to stop within vision, is the general construction of that rule. In answer to question, what do you mean by under control, stop in what time? witness answers, within vision I suppose, so you could stop within vision is the idea, if there is anything between you and there you would be able to stop. In answer to question, if there is a switch signal red and an engineer is approaching it I will ask you whether or not he is to be under control as to that—in approaching sidings and yards he must be especially careful as to the indication and position of all switches, taking that rule, I will ask you whether or not it is the duty of the engineer to have his train under control in approaching a switch, witness answers, I should think so, strictly speaking, under the rules. In coming towards Flowery Branch from the south you can see this particular switch target, about fifteen rails. I have tried it; we made a special test of it; stopped the engine just where we could see the switch. The switch target, I should judge is about 18 feet tall. I could see that target from the front of the engine. The target is more on elevated ground than engine; the target is considerably higher than the engine. I could see
139 it regardless of the engine; fifteen rail lengths—30 feet each; I should judge so, some of them go 33 feet. In approaching from that direction there is a curve at the point where you can first see the target—you are on the outside of the curve; the curve is to your left. In making the test I had engine 528; I know the character of the engine Mr. Miller had; it was practically the same size. As to the cargo we had in test train, only know it from the general talk among the crew; of course they said they were loaded with pig iron; I should, think the conductor knows about that; Grogan was the conductor; Mr. Grogan was in charge of the test train too; Mr. Chatham was running the engine on the test train; I was just along on account of being one of the witnesses. As to the test made and the result of it, they came around there in Flowery Branch running at pretty good speed—I should say 30 or 35 miles an hour; as quick as the engineer could see the switch he put the brakes in the emergency; he stopped along by the 215 or 20 feet, at the speed of 30 or 35 miles an hour. We made another test, we went back and tested switch at low rate of speed, about fifteen miles an hour; they didn't make emergency application, made service application, and stopped before they got to the switch. At the time the accident happened I didn't see my fireman; he told me he was on top of the *tendon* shoveling coal; that is what he told me afterwards. I don't know where he was.

They were making that test I suppose for the purpose of
140 using it in this case. I don't know the tonnage of the train I made the test with. I was standing on the engine when they made the test; standing behind the engine looking out. I should think there is a good deal of difference when you know you have got to stop and when you are looking out for a thing to be just so, and a case where you didn't expect it. Taking the average engineer

running as I do up and down the road, when I have the right over another track I don't expect to find the switch turned; I don't consider the rule to require me to expect to find the switch turned away from the main line. It is a fact I run on the presumption it will be set to the main line. In answer to the question, isn't it a fact you could not carry on the traffic of the road to come to a stop for every switch, could you do your business on that plan, witness answers, I don't know, that would depend largely on how much business. It is all moonshine about expecting that switch turned from the main line. Miller had a right to approach there expecting to find that switch turned to the main line. In answer to the question, he had the right of track over that train, witness answers, we wasn't any more than a string of box cars. He had a right to run up there without reference to my train; I don't know whether you would call it a mistake or not to turn that switch to the side track; it was correct. In answer to question, what was that about vision, witness answers, he asked me the question what we considered under
141 control, and I told him going at a speed that we could stop within vision. If coming around that curve that semaphore board had been pulled on him and he could have stopped before he got to it, that would have been within vision. As to whether that would have complied with the rules is owing to what you have reference to—if you are talking about the semaphore. In answer to the question, freight trains must approach all stations, water tanks and coaling platforms under control. This don't mean that freight trains must necessarily stop, but they must approach stations, water tanks and coaling platforms under control, and prepared to stop," wouldn't you consider that station to mean the station building and the semaphore board—is there anything else you can consider it to mean? witness answered, I don't know as I ever considered the depot was the station. In answer to the question, what point is there that can stop you, a switch point can't stop you unless you see the signals, witness answers, when you are supposed to approach a station under control according to your theory of it, you would only have to run under control thirty feet. In answer to the question, here runs your track and here is a curve and here runs the siding by it and the switch comes into the main line in a cut, a curve like that, and here is your depot and your semaphore signal up there you can't see the semaphore signal at all until you get past this switch point around out of the curve, would you consider that rule to mean that you ought to pass there pre-
142 pared to stop at this switch point—read any of these rules that he read, witness answers, the rules that you must approach sidings and yards they must be especially careful. In answer to question, do you do that, witness answers, no sir. Take all the engineers on the road the general custom and practice I don't think they would come to that switch point prepared to stop if they had no orders. I wouldn't say that I never knew one to do it. As to whether I ever knew of one that did I would not say about that. I don't think that it is a practice at all. I never said there was a rule which required them to stop. What I said it required them to do was to approach—it says they will be held accountable for

passing one. In approaching sidings and yards they must be especially careful as to the indication and position of all switches. In answer to the question, that means after you come in sight of it, could it mean anything else, witness answers, I don't think so; if you were going to carry out the rules to the letter, I think you would have to approach the switch under the control regardless of whether you could see it or not. It says careful. I would not think if you were approaching it 60 miles an hour that would be careful. 60 miles is not even careful at that point here. In answer to the question, what about 30 miles an hour or 25 miles an hour, witness answers, if you are approaching it careful, I don't see how you could do anything only approach it so you could stop. This is my construction of the word careful. I said I didn't know of
143 any engineer that run on that plan. I have been running an engine about twelve years. I never did run that way, not for all switches I said that my train was practically dead and that the switch ought to have been turned to the main line; the only thing that could stop Miller was the red board or something else. Under the rule the only thing that could stop him was the red board —suppose he dropped the signal on him. In answer to the question, the only thing under these rules was that board, witness answers, he could have been flagged. I don't think the board was ever up that morning; the day man had just come on; I don't think he had gone on duty; we had called him in the office. This man could run on his own rights. There was an operator there, we had called him in the office, but I don't know whether he had placed his semaphore in position. I did not get an order that this man was coming. What made me expect him was the fact that he was due, and we were dead. I don't know how long we had been there dead; we had been there some little time I would say; we came in there for 35; I can't say how long we had been there, must have been there something like an hour. I think we got an order there that our train had been annulled; we were a dead train anyhow; I don't pretend to say how fast Mr. Miller was running; I should say that our engine was fifty feet, something like that from the siding—from the clear. In answer to the question, a man coming in sight of a switch target like that it frequently takes him a little while to see it—suppose
144 he is looking first for the semaphore signal, not expecting the switch to be turned, it takes him a little time don't it to observed the switch if turned wrong, witness answers, probably not if he was looking for the two at once. You could not look for both at that particular place, not both in line, not from where he could first see the switch. It takes a man a little time to stop a train of that sort. If I was going 20 miles an hour with 36 loads up that hill, as to how soon I could stop it would depend altogether on conditions and the kind of loads and the condition of the track and everything. Load of 950 tons is pretty heavy with the kind of grades we have here—pretty heavy load. The grade to come up there is not pretty hard; the train will roll up into Flowery Branch without working any steam at all—if you shut off over the hill the other side of the culvert.

In answer to the question, how far would that be from Flowery Branch, witness says, shut off over there a mile and a half would roll up to the switch; it is not up grade all the way; it is up grade for ¾ of a mile and the tail end of your train would be coming down when the engine was up to the switch. You would have to get something of a start. I don't know about the speed limit on engines at that time when they were behind time. In answer to the question, suppose you were five hours late (I have read rule P) don't that engineer exercise his discretion witness answers, that does.

If you notice there is no minimum time for passenger trains,
145 but there is for freights; the minimum is supposed to be the limit; when you are on time you don't need the maximum. I should think it true that even the minimum is taken off under those rules. The minimum is figured at 30 miles an hour, and that is kinder supposed to be the speed limit for freight trains; not restricted by it; I don't know at what time this train hit my train. In answer to the question, suppose it hit your train at either 7.10 or 7.20 that took 30 to 40 minutes for the run from Buford to Flowery Branch—is that a fast run, witness answers, extremely slow. He could not have been running at 35 or 40 miles an hour if he actually left Buford at that time. If he left at 6.42, not that either; he could not have been going fast; it is not but seven miles. I don't know that the switch was set up when 35 passed. I should say this collision occurred 35 or 40 minutes after 35 passed. The switch was out there in plain view. Besides the front brakeman, Mr. Hurst had a key.

In answer to the question, did you see anybody else about there, about the switch, witness answers, I didn't see anybody about the switch; I remember there was a negro or two passed by the engine from some cause before I left the engine. I remember my brakeman speaking to me; I don't know anything about them. In answer to the question, Mr. Arnold started to ask you awhile ago taking a train with 36 cars with 950 tons with the engine that Miller

had and approaching this switch at a rate of 17 or 18 miles
146 an hour I will ask you how far, what distance it would take him to stop that train, provided the air was working on all the cars but one and in good condition at that place, witness answers, I should think if he lambed the brakes on in emergency, stop in six or seven or eight rails; I mean rail lengths, they are usually the same. In my opinion he could have stopped that train after reaching a point where he could see the target before reaching the switch, at the speed of 17 or 18 miles an hour. My train I would say was about a car length or a car and a half from the clearance. The clear post is a post put in the ground supposed to be the point where you clear the main line. I don't know the exact distance of the post from where the side track leaves the main line, it must be about 40 feet from where the rails actually separated. It is supposed to be clear where the distance is far enough the two cars are clear. My train was on two tracks. How we got it on two tracks, we doubled over before 35 passed. We headed in and then we cut off and backed to clear the house track and headed out from

this main line switch that Miller turned in, and backed on to the house track. At the time I did that this switch was used. It was open when I went in. It was closed when 35 passed and was opened again by somebody, I don't know who. It was opened twice that morning. If it had been left open when 35 passed through that morning it would have torn it up.

147 After 35 passed I don't know whether Mr. Hurst knew that our train was dead or not. In answer to the question, if he knew you don't know it, witness answers we had been discussing it, the conductor and myself. In answer to the question, if your train had not been dead you would have pulled right out after 35, witness answers, ten minutes after 35 we would have been in condition. In answer to the question, if it had not been that your train was dead the proper thing for the front brakeman would have been to turn that switch, witness answers, not without instructions. In answer to the question, haven't you known them to do a whole lot of things without instructions, witness answers, I have known a whole lot of us to. In ten minutes if we had not been dead we would have pulled out on this occasion. Nobody was supposed to open the switch. In answer to the question, he was the only man you knew of had a key, witness answers, none outside of the crew. I could not say what other members of the crew had a key; I don't know whether the flagman had one. Mr. Hearst was up around the engine. I don't remember if he came back on the engine after 35 passed. I was not on my engine when the collision occurred; I was up at the depot; my fireman was up on the tender; he was a negro.

When the engine that Miller was on struck mine as to how far back did it move our train I would not like to say, but it moved it some little distance, an engine and four or five cars at-

148 tached to it. It was a solid lick—probably 30 feet or more, I would not say—some little distance though. In answer to the question, now at the time this test was made with the test train run down the main line, how far did the engine on the main line run, the first test you made, stop from opposite where Miller's train struck, witness answers, I think it would have about crushed the pilots, would have been about the extent of the damage; the lick would have been very light.

My engine was right smartly damaged; the collision was a pretty hard one; it knocked it somewhere in the neighborhood of thirty feet; knocked the pilot off; I would not say about the headlight; I don't think the smoke stack was knocked off; the fireman was not hurt; he didn't stay on the engine when the lick occurred; he jumped off the tender; the greatest damage was done between the engine and tender. In answer to the question, in coming up that grade 15 or 18 miles an hour suppose the engineer discovered when in about six rail lengths of that switch that it was turned wrong, and suppose he shut his throttle off and made every effort to put the air in the emergency but never completely did so, that would not stop the train would it, witness answers, I should think she would drive on in the side track. Probably not be running over four or

five miles an hour. In that instance they would come together a little. The main line is comparatively level from the south
149 switch to the depot. The side track is a little bit lower, but not down hill.

I could have seen this signal from that target about fifteen rail lengths, that is about 450 feet.

H. T. Cox, sworn, said:

I am one of the defendants in this case. In June 1904, I was a conductor with the Southern Railway. I was conductor on No. 81 to Flowery Branch. At the time Mr. Miller's train came to Flowery Branch I was in the telegraph office. I didn't see his train as it came. I don't know what speed it was running. I know where the switch is, the south switch at Flowery Branch. I know where it is located; know the switch target also. A man as he approaches from the south on an engine can see that target about fifteen rail lengths—450 feet. I was present at the time a test was made. I didn't have charge of the train. I was with the train. Describing the test witness says, we came around there I suppose running about 35 miles an hour, and got to a point where we could see the switch target, the engineer could see the switch target sitting on his seat and shut the engine off and put the air in emergency; we went then 210 feet north of the south switch. At that time we had an engine of the same class that Miller had. As to tonnage I didn't figure that myself; I was not the conductor of the train, 809 tons they said, 25 loads. I don't know what they consisted of—pig iron and lumber; they were not at all loaded with the same kind of
150 freight; I don't remember how many loads of pig iron; we made another test. In this test we backed up and came around there about 15 miles an hour, and the engineer made a service application just like he was going to make an ordinary stop, and he stopped about 70 feet before he got to the switch. When we made the first test the front end of our engine with the test train was about opposite where Voils' engine was standing on the side track the day of the accident; hit just about hard enough to knock the pilots off; I didn't know the switch was turned wrong until after the accident; I don't know who did it; there was a great many around the station; I didn't see anybody about the switch; the sort of key they carry to that switch is a regular switch key, brass key; same key fits all switches on this division.

As to whose business it was to look after that switch, the conductor is supposed to see that it is properly set when he goes into the siding; the front brakeman had the particular duty to look out for it; it was his duty to fasten the switch; it was his duty to see to it as far as he can; I was in the telegraph office making out an accident report all the time from the time 35 left. I had no other business outside of that. Mr. Voils was in the telegraph office. We went in there to make out an accident report; our engine broke down at Oakwood. As to where I left the front brakeman, the last I saw of him I watched to see if he closed the switch; after
151 he closed the switch he walked away; then after that 35 passed there; then after that the switch was opened again, I

suppose, after 35 passed there. I suppose the front brakeman knew we were dead; I don't know that he did. If our train had not died at that point, had not been annulled, we would have pulled out after 35 passed, after the elapse of ten minutes, if we had not got any further orders. In that view it would have been the front brakeman's duty to open the switch after I had told him. Frequently they do these things without me always telling them, if they know what they are doing. If a fellow is experienced you don't have to tell him every time. It is not his duty to open a switch until I tell him to. In answer to the question, they don't always wait, witness says, until they see somebody make some point—I am talking about my men. As to whether anybody else at that switch had a key, witness answers, the section foreman of the railroad; I don't know that I saw him around there that morning; I had not noticed; nobody else besides the section foreman of the railroad supposed to have a key. When they struck my flag my flagman was at the depot at the telegraph office. As to who was down at the front towards the switch and the engine, I don't know where the brakeman Mr. Hurst was, it was his place to look after the train, look around the train, and after that he has got no particular place. The front end of the train was his place; he done
his work on the front end of the train; where he was I don't
152 know. Miller had a right of track over him. Miller had a
right to run through there without regard to that switch. He had a right to presume that the switch was set to the main line. I don't know what speed he was running through there. I don't stop for switches; I don't stop for them. They are supposed to be set. In answer to the question, you could not run on any other supposition and make the schedule if you had to slow up before you came to every switch on the road and stop and examine and see whether it was open or shut, you could not make the schedule, witness answers, that depends on what the schedules are. In answer to the question, take Miller's schedule with him three or four hours behind and going to Oakwood to meet the bell train, could he have made his time and watched out for switches that way, witness answers, I don't remember how much time he had. In answer to the question, suppose he had just enough time to get in there and clear the schedule time, witness answers, a man is supposed to come around and stop if the switch is wrong. In answer to the question, show me the rule that says that, witness says, I don't say, it might take me some time; it might take me an hour to find the rule. Asked to point out the rule, witness says, he is supposed to come around there under control. In answer to question, what rule says he is supposed to come around there under control, find any general or special rule that says he is supposed to come to that switch under
control, or any rule except all freight trains must approach
153 all stations, water tanks and coaling platforms under control,
witness answers, under control means to stop. In answer to the question, do you call switch points stations, witness answers, what I call a station is from one switch point to another switch point. I never heard a semaphore called a station; from switch to

switch is what I call a station. In answer to the question, take a station right here and a depot, it has got a semaphore signal; here runs your track in a curve, a long siding that comes down in a curve, a cut, out of sight of any semaphore signal, you come in sight of this switch, you not really in sight of the station, you mean to tell me that you ought to come to that switch prepared to stop, witness answers, according to the rule. In answer to question, do you consider that switch point to be the station, witness answers, that is what I call a station. I call one thing a station and you call another. In answer to the question, you can't show me the rule that calls that a station, witness answers, you can't show any that don't. In answer to the question don't you think a railroad is to blame that you can't tell anything more about it than that, witness answers, that is what I call a station. I don't know that we have got a side track a mile long. In answer to the question, you mean to tell me that a side track a mile long you have got to come up to that end of that thing prepared to stop, did you ever do it, witness answers, yes sir. In answer to question, when did you do that—you
154 expected to take the siding when you did that, witness answers, I have done it when I didn't. As to circumstances that would make me stop, I don't mean to say that I would stop. In answer to question, what do you do, witness says, under control. You are under control when you can stop any distance you can see. I am not talking about how all the trains are run on this road.

There are some little spur tracks on the road where are no depots and no semaphores. No regular tracks where there is not a semaphore. Flag stations are not regular stops. In answer to the question, where there is a siding, I will ask you whether or not there is a signal and whether or not there is always something to indicate that siding, witness answers, the switch target at all the main line switches.

E. S. HURST, sworn, says:

I am one of the defendants in this case. I was brakeman on train 81 at the time Miller got hurt. I set the switch after backing in the siding for 35 to pass. I didn't change that switch any more. I don't know who did. I saw two or three around there. After I set the switch and 35 passed, as to where I then went, one place I went to was the well about 75 or 150 feet from the railroad. I drew a bucket of water and went to a grocery store, and then I went back and remained with the rest of the crew in the office making out a report. In answer to the question, how many times did you
155 move the switch that day, you set it for 81, witness answers, yes, after we finished doubling in, we had to double in on two tracks, I set the switch for 35. In answer to the question, then you set it for the main line 35—you changed it to set it for the siding at the time, that was before 35 passed, witness answers, yes, we used switch to back into the siding. When we were using the switch I had to set that switch, then after that I set it back to the main line for 35. I didn't use it any more.

I had an idea that our train had been annulled, but I didn't

know it. So far as I knew it was going on to Buford. After we all went back into the siding 35 was to pass, and I threw the switch back then to the main line for 35 to pass. I did not then throw it back to the siding again. In answer to the question, are you sure of that, witness answers, I am satisfied. I didn't run up to Mr. Miller and start to tell him that I had turned the switch. I went up to Mr. Miller through a lot of stuff that was thrown there in the wreck. I didn't think our train was going to pull out again and on that supposition throw the switch back to the siding; I had a key to the switch. I was in plain view of the switch at the well. I was where I could see it all right. It was my business to look out for the front switch. In answer to the question, and I understand to see that the switch is turned right, witness answers, not my business to see; it was the whole crew's business. In answer to
156 the question, whose business was it any more than yours to see that it was set right, wasn't it Mr. Cox's and your's both, witness answers, I said the whole crew's; it was the engineer's too.

I don't know how long I placed it for 35 before Miller's train came; something like 45 minutes. In that time I didn't see the switch at all until Miller's train hit ours. I didn't know that it had been changed from the way I had locked it.

It is a fact that I didn't pay any more attention to it. I was at the well and could have seen it if I had looked.

E. B. STARK, sworn, said:

In June, 1904, at the time Mr. Miller was hurt I was flagman for 81, Southern Railway; At the time Miller's train came to the station I was in the office door. I saw the train; looked like the train was coming at a speed of 30 miles an hour. I didn't see whether Mr. Miller put on the air in emergency. That switch was set for the siding. I didn't know this until after they came in there. I was not present at a test made afterwards. I don't know anything about that. I don't know anything further about the matter than this.

I had not been asleep in the cab after I got to Flowery Branch. I didn't tell Miller that I was in the cab asleep when the crash came. I was standing up in the office door. I was not in the cab at all. Mr. Voils was in or about the office. Mr. Cox was there. As to what they were doing, they were getting orders. Mr.
157 Voils was down around the office there. I don't know what he was doing down there. I could not say whether he was at his engine or not. I could not see the signal from the office. Cars were not between me and Miller's train. When I said about 30 miles an hour it is just estimating.

F. B. CHATHAM, sworn, said:

I am an engineer in the employ of the Southern Railroad. In answer to the question, I will ask you if you ever made any test at Flowery Branch to see how far you could see the switch signal approaching from towards Atlanta, witness answers, why 650 feet, between that and 700 feet. At the time I was sitting down in my engine on the right hand side; that signal switch target I suppose is about 15 feet high. In answer to the question, was the engine

in the way of seeing that or not,—the front of the engine, witness answers, I was just sitting in ordinary position on the engine this way, looked out and saw the signal. The front end of the engine didn't interfere with my sight of it at all, not from where I was, between 650 and 700 feet, is what they measured it. I am an engineer. In answer to the question, with 36 cars with a tonnage of say 950 tons, an engine as Mr. Miller had, 175 or 180 pounds pressure, with 35 cars working air in good condition, from point where you can first see the switch target, coming at the rate of 17 or 18 miles an hour, I will ask you how far, in your opinion, you
158 would go before you could stop a train of this sort, witness answers, that is all according to the brakes. In answer to the question, suppose there was air working on 35 of the cars in good condition, witness answers, we made a test there about 15 or 20 miles an hour and lacked 70 feet of going to the switch; in that test we used service application; if we had put on the emergency application we would have stopped quicker. First test we made was between 20 and 40 miles—about 35 miles an hour I suppose, then we used the emergency, then went 210 feet in the switch.

WILL GAINES, sworn, said:

I am road foreman of engines of the Southern Railway Co. Am practical engineer. Am familiar with air brakes and things of that sort. I know the road just south of the south switch at Flowery Branch. In answer to the question, suppose that you had a train of 36 cars, with a tonnage of 950 tons, with an engine of 180 pounds pressure, and was going towards the north switch at Flowery Branch at a speed of 17 or 18 miles an hour, how far, if 35 of the cars were working air in good condition, would you go before you stopped, if you were to put on air in emergency, witness answers, not more than fifty yards. I made a test with a train at that point. The sort of engine we had was 21 x 28 inch cylinder, an engine about ninety tons weight; it was the same type, same size, as Mr. Miller had when he was hurt. We had something over 800 tonnage. I don't
159 know the exact tonnage. My recollection is we had 27 cars. I am not very positive. I observed to see at what point from which we could see the switch target. An engineer in his natural position on an engine of that type can see that switch about 500 feet. In answer to the question, what test did you make, witness says, we first approached the station at a rate of speed between 30 and 35 miles an hour—I think we were running at least 35 miles an hour, and we made emergency application of the air brakes as soon as this switch was visible from the engineer's position, and we stopped the train about 200 feet north of the switch. Then we made another test. We approached the station between 15 and 20 miles an hour, and we made a service application of the brake at the same point, and we stopped about 75 feet south of the switch—the engine that far south of the switch, that is before we reached the switch. With the train described pulled by Mr. Miller, 36 cars with that engine, from the time the target could have been seen from an engine, there was ample distance in which to stop that train by putting the air into emergency before reaching the switch at the rate of speed

mentioned—at 17 or 18 miles an hour. At each switch there is a switch target; when the switch is normal, that is when the switch is set to the main line, it shows white, both the target and light at night. The red target you might say is danger signal—it is to determine the position of the switch; it indicates to the engi-
160 neer when he sees it, the position of the switch. If it is wrong, it is for him to stop. If it is red it indicates that it is turned for the siding. Red signals are always danger signals, indicates stop when you see it; that signal is put there for the use I might say of all trainmen, and I suppose more especially for engineers, as they are on the head of the train. That target is elevated I suppose 15 feet high. It is put up so high so it can be seen at a greater distance, make it visible, more plain.

Defendant closes.

JOE TANNER, sworn, said:

I recollect the morning that Mr. Miller run into Mr. Voils there at Flowery Branch; I was not working for the road that morning. I was a section hand on that section. Capt. Smith was my boss. I was section hand for the Southern Railroad. I went by the switch before the train came that Miller was running. It was a right smart little bit before the wreck; it was about half an hour. When I went by there it was thrown for that train to go on down to Buford, thrown away from the main line. That train was standing up in the siding—35 had done passed—35 passed there ten or fifteen minutes or about 30 minutes before I walked along there. It was before Mr. Miller was hurt that I went along there.

I was going to the shop—going from the shop just below. Was by myself. I went by the switch. The switch was turned
161 to the siding so as to let the train into the side track. Nobody in sight. Nobody was around there. I didn't see anybody at all. I went on. That is all I know about it.

I heard Mr. Miller's train coming. As to whether I knew there was going to be a wreck I told them if that switch was turned they would sho be a wreck up there. I heard the crash when the two trains went together.

I told my wife. I told her that if that switch was not closed. I knew that switch was wrong. I knew it because I had seen it turned. In answer to the question, why he didn't tell the people connected with that train, witness says, I could not tell them I was gone home. And why he didn't tell them before he went home witness says, I didn't see anybody to tell. I went by Capt. Smith and thought he would come out after awhile. I was working for the section man. Am working on the section now. I went home and told my wife they was going to have a wreck. I didn't tell these folks. I did tell Capt. Smith.

I thought they was going to let this train out, but heard the other train coming up.

In answer to the question, who did you tell what you know about this case, witness says, that is all I know about it. I don't know how these gentlemen knew what I knowed about it. I didn't tell it

to anybody only Mr. Smith. Mr. Miller didn't see me.
162 Nobody has seen me until they brought me up here. Nobody has ever asked me what I knowed about it; nobody ever talked to me about the case—nobody at all.

HERSCHEL MOONEY, sworn, said:

I live at Flowery Branch. Albert Mooney is my father. I recollect the day Miller's train ran into Voil's train. I didn't see the collision. I was around there before the wreck occurred. I passed about twenty feet of the switch; I never went to it; I just saw it open; I suppose this was 20 or 25 minutes before the wreck occurred; 35 had passed down. I could not swear who it was, who I saw open it; he was one of the train men; he went back to the engine; I couldn't say what he done when he went back there; I was on one side and he was on the other side; he went back about the engine; he was a young man; I have seen Mr. Hurst here; I could not say it was him. I saw him open the switch; he did not close it again; that was after 35 passed.

He was a white man—young man; had no beard. I don't remember exactly what build—stout or slender. In answer to question, how did you know he was a railroad man, witness answers, he come there with the train; I saw the train come, the train that came from Oakwood, I saw him come with that train; I saw him change the switch and he came back towards the engine; didn't see him
any more. I know he came with the train. The train
163 came in there about half an hour before 35 ran, I think. My name is Herschel. In answer to question, what do you mean by opening the switch, witness answers, I never opened it, the railroad man opened it; he opened it to let the train go; he threw the lever; throwed the switch so the train could go out of the side track; he threw the side track on to the main line so that the train on the side track could go on to the main line. I didn't see anybody there besides the railroad folks. Saw no tramps around there.

CLIFF MOONEY, sworn, said:

I am younger than Herschel. I recollect the morning they had the wreck at Flowery Branch. I saw the wreck. I was not so very close to it, but engine jarred the cars where I was, I was standing up there at the crossing when he got hurt. I saw the gentleman that threw the switch that morning. I don't remember when 35 passed. He threw the switch after 35 passed. He was a low fellow about five feet tall; he was a young man; it looks like Mr. Hurst, but I couldn't swear it was him. I could not swear it was one of the railroad men. After he threw the switch he came down the railroad track and went on the opposite side of the engine where it was standing.

He was a white man. I don't know who he was. Just simply saw him. I didn't see anybody about there with that gentleman. I saw some tramps but they were not anywhere about the switch. I
have seen a switch key. The flagmen and the brakemen have
164 them. I think they have one at the depot. I don't know whether a great many could have one or not if they wanted it.

G. C. MOON, sworn, said:

I live at Flowery Branch. I remember the day in June when Mr. Miller's train ran into Mr. Voil's train there. I had seen the switch before the wreck; it was turned so as to throw any train on the passenger track on the house track. In answer to question, how long did you notice it turned that way before the collision occurred, witness answers, 35 passed that train on the side track and had time to run over to Buford and 72 had time to come back; I will judge that it took about 15 or 20 minutes; I mean the switch was turned again just after 35 passed; some young fellow turned it, one of the train crew I took him to be. I was the distance of the depot to the switch; he looked to be a young man; after he threw the switch he came around to the engine; I couldn't swear that he was one of the crew that came with that train. I noticed him, Capt. Voils, Cox and that young man with a grey suit on, but I couldn't swear whether it was either one of them or not; he was a young man—I could not describe him; he had on overalls and walked back towards the train and engine. In answer to the question, when you went back there did you call their attention to the switch being turned wrong or anything, witness says, I walked to the depot and remarked to
165 somebody that the switch was open. I just remarked it before the crowd that was in the depot. There was present, to the best of my recollection, engineer Voils, Capt. Cox and Mr. C. R. Parsons; the instruments were clocking and they may not have heard my remark. In answer to the question, how long was it after that until the wreck occurred, witness says, I got up there at the railroad about six o'clock or probably half after six, and it occurred a little after seven o'clock.

I didn't state to them in the yard that the switch was open, it was in the depot when I said that the switch was open; I don't know whether any of these gentlemen heard me or not; they said nothing; neither of them made any reply; I said nothing further. In answer to the question, you saw some tramps around there that morning, witness answers, two white men and a negro, I suppose came with that same train that was in the side track. In answer to question, it may have been one of these men so far as you know that opened the switch, witness answers, I could not tell you whether they had on overalls or not; a great many people wear overalls.

I have seen a tramp wear overalls; working men too. The man that opened that switch walked around the train; I don't know whether he came to the depot or where he went. I live at Flowery Branch; have lived there about twenty years. I work at my father's store.

166 W. M. MILLER, recalled:

I was not notified that there was going to be an experiment made—the one mentioned by Mr. Chatham and other gentlemen. The first I knew of it, I had a half brother that was hostler for the Southern road at the North Avenue shops, and he told me they came down to get an engine to make a test at Flowery Branch. A few days after that I met Bob Grogan, and he says why ain't you up at Flowery Branch. In answer to the question, you heard the statement

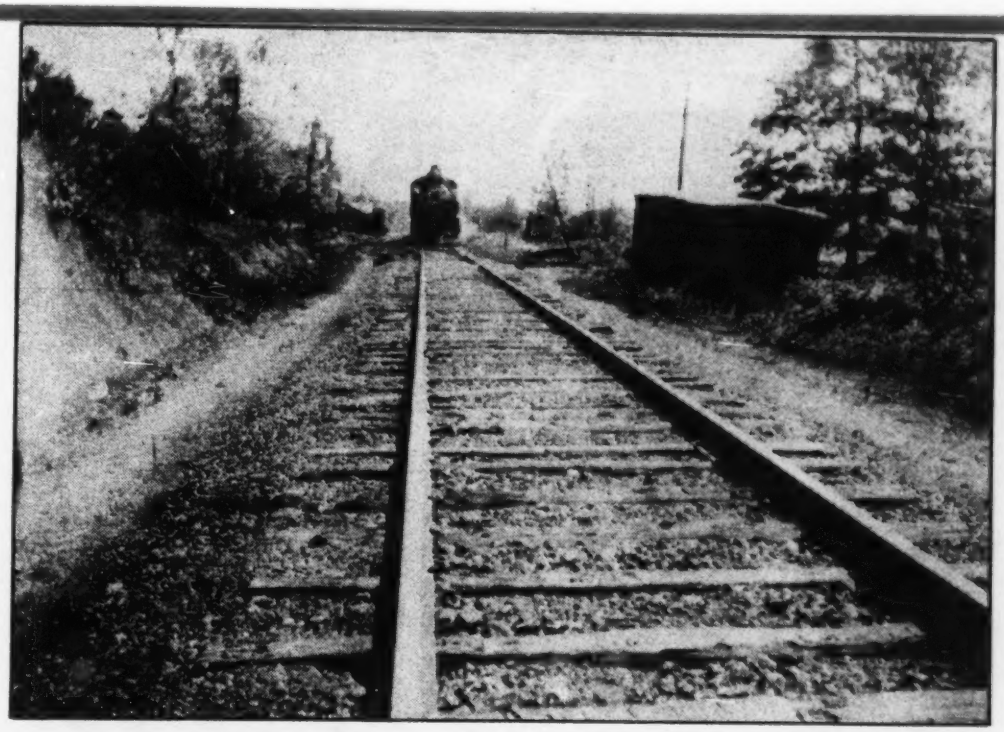
of some of these gentlemen that you could turn an engine loose a mile or mile and a half from Flowery Branch, if you got a good start and roll into Flowery Branch, witness answers, I don't think it would do it. Mr. Voils might be honest in it; I don't think the train I had would do it; I never made a test of it; I don't know whether it would do it or not. In answer to the question, what were you doing as you were coming around that curve, witness answers, I was sitting on the right hand side, with my left hand on the throttle and my eyes were on the outside of the engine cab—I was sitting up straight, I was this way (showing jury) most always run an engine that way, unless it was raining or cold, bad weather. That gives me an opportunity to see out a little bit. When I saw the switch target I don't believe I was over six rail lengths. In answer to the question, what was there that you could do that you didn't do in order to stop your train, witness answers, noth-
167 ing that I could do. I did all I could. I heard Dr. Hancock testify to the effect that I didn't complain of anything much but my ankle. I complained to him about my shoulder and back various times. He says that is a matter of a little sprain and he says you will be running an engine again in a few days. Dr. Hancock never treated me for four or five months after I got hurt until him and Dr. Jarnigan consulted from that X ray picture that Dr. Jarnigan had taken, then Dr. Jarnigan come and talked to me about it; he and Dr. Jarnigan talked about the difference in one foot and the other.

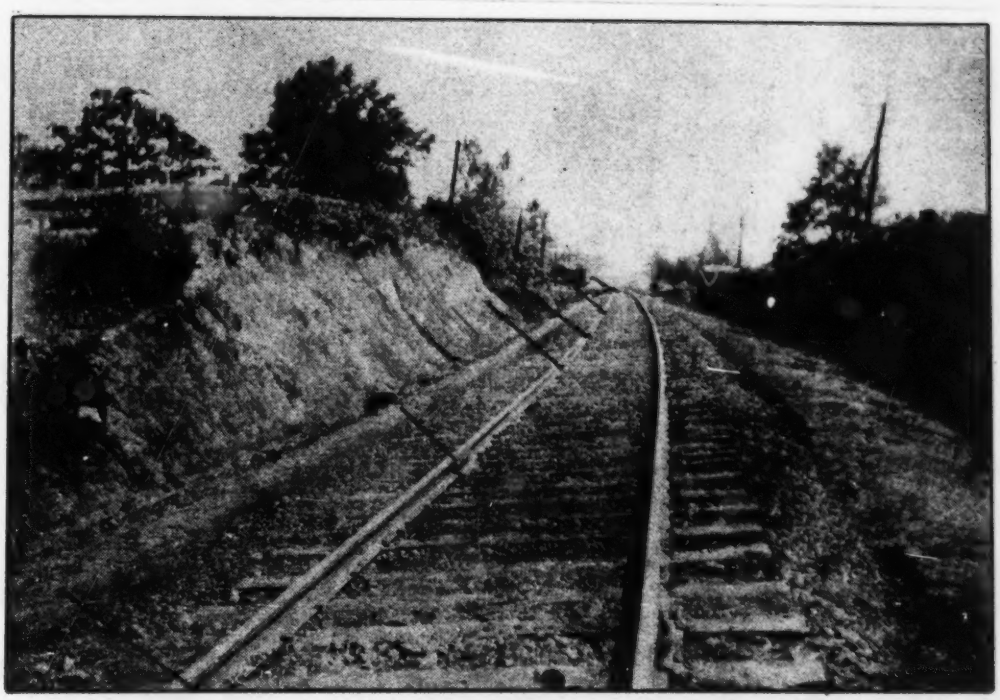
After I was hurt Mr. Hurst came up to me at Flowery Branch; I was suffering considerably at the time; he came running up to me, Lord, he says, I tried to get to the switch, I tried to get there. I says, Ed. who in the name of God set that switch, he says, I don't know; at first he told me he tried to get there, I says who in the name of God set that switch, he says I don't know. He spoke like he wanted to own it, but denied it; it may have been because he was excited right smart; he just said I tried to get there; that was when he come to me; just as I hit the ground and crawled up there he come to me. In answer to the question, you thought he was coming up there to make a confession, witness answers, I don't know what you call that, or whether it was a confession or whether he was just scared. I suppose he helped get me to the house. I don't know who did help me in Dr. Cobb's house. I knew Mr. Hurst from a boy. Mr. Voils and Mr. Cox I knew them. I didn't know person-
168 ally any of the rest. I didn't feel like identifying people; I was suffering at the time; I was excited; it would excite anybody; can't say as to Mr. Hurst.

Plaintiff closes.

Mr. VOILS, recalled:

I heard what Mr. Moon said about stating at the station that the switch was open, in my presence and others. I did not hear that statement. I don't remember seeing Mr. Moon. A man with one leg can run a locomotive engine. There is a number in the United States running engines, one Mr. Herring on Southern Railroad.





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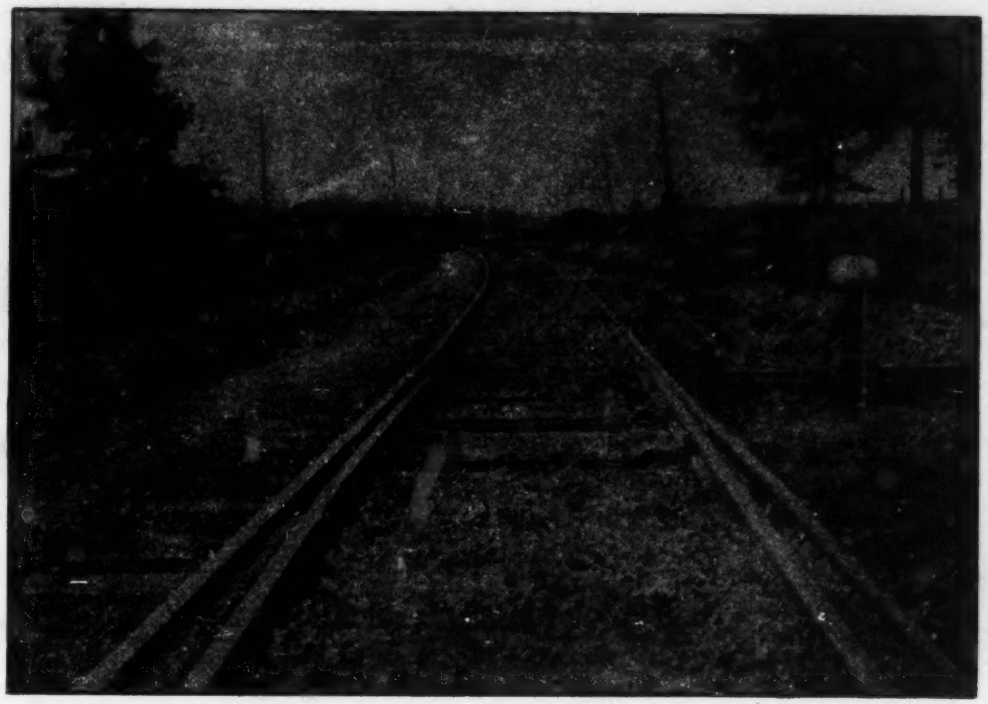

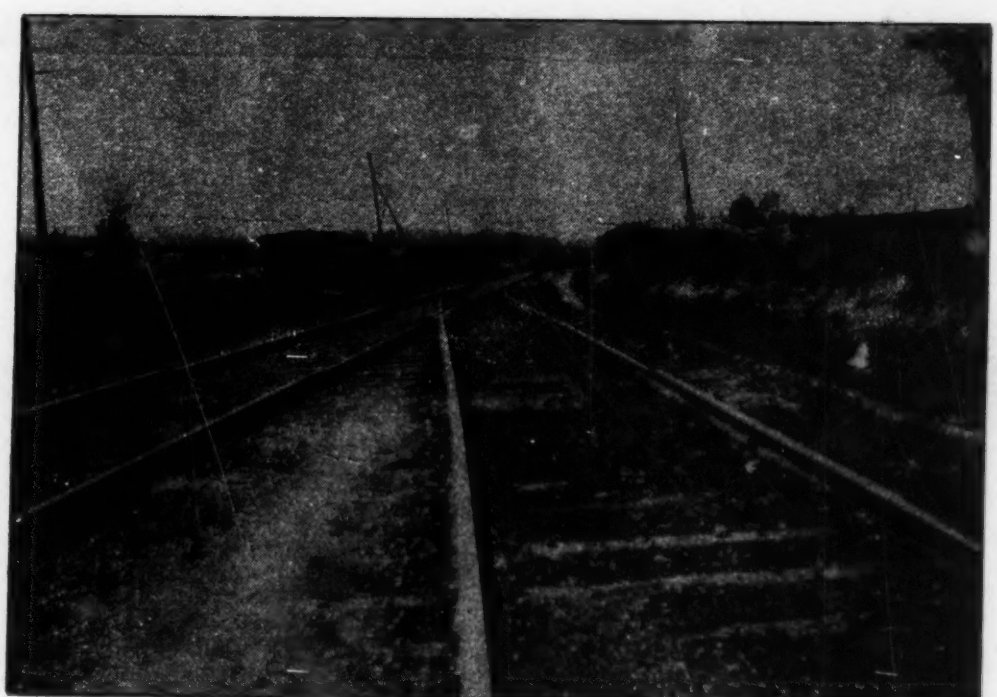

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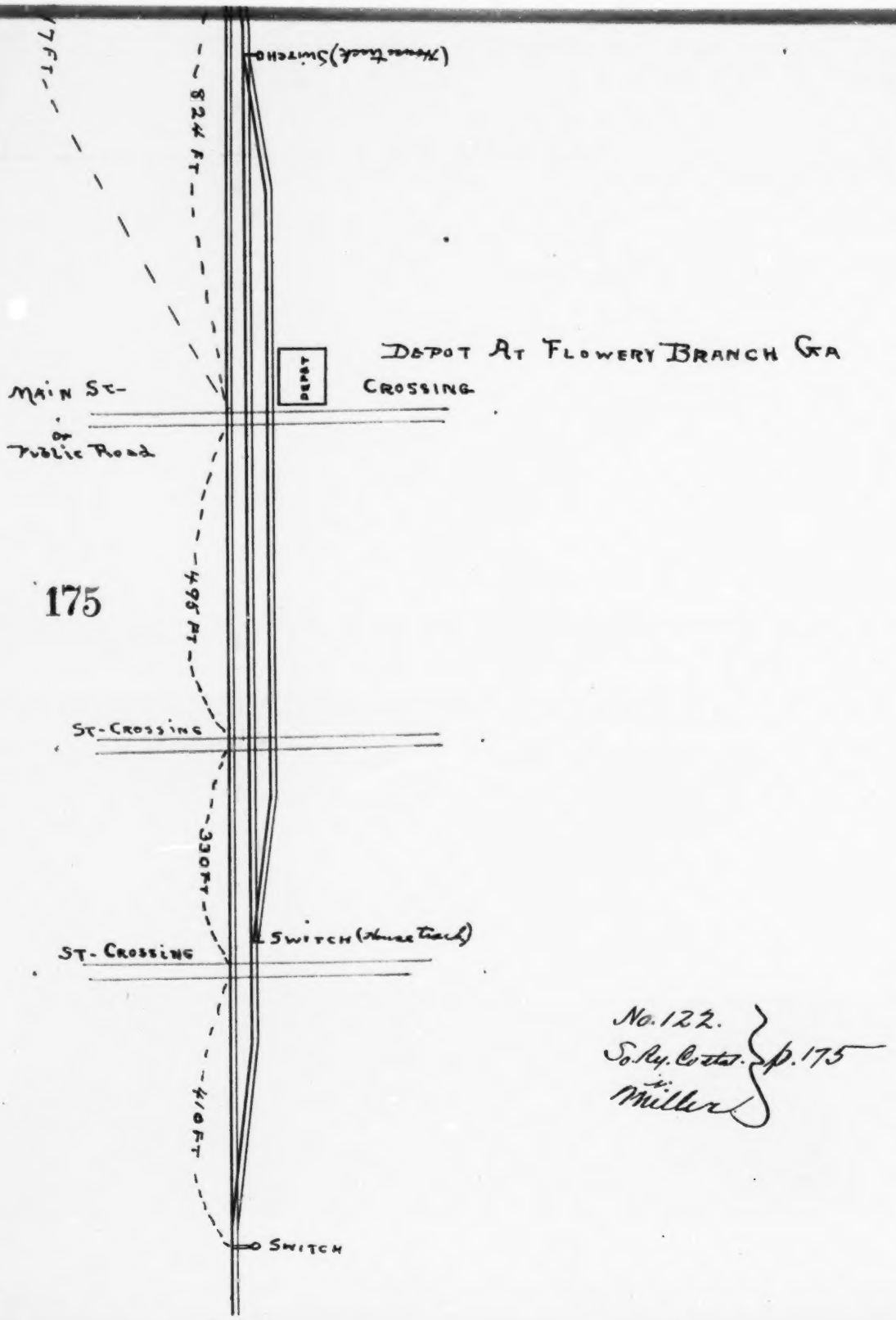
v.
Miller



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Miller

Scale 200 Ft- To Inch

Georgia Hall County

The above are true measurement of the Southern R.R. tracks at Flowery Branch Ga taken by me May 21/07

C L Newton C.E.
Hall Co Ga.

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So. Ry Co. et al.
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Miller
} p. 176.

No. 122
So. Ry. Coastal } p. 177
Miller

A man with one leg can run one, but you would not cut off one leg in order to run one.

H. T. Cox, recalled:

I heard what Mr. Moon stated in my presence that the switch was open on this day that Miller got hurt. I didn't hear that statement. If I saw Moon there anywhere I don't remember it.

C. R. Parsons, sworn, said:

On the day that Miller was hurt, after 35 run, I did not hear Moon state in my presence that the switch was open.

I have no recollection of it one way or the other. I am pretty sure he didn't mention any switch in my presence. No, I didn't hear it. That wreck occurred a little after seven o'clock, ten minutes after seven, I think. If they left Buford at 6.40 and got to
169 Flowery Branch at 7.10 that is a rate of about 14 miles an hour; average run of 14 miles an hour between stations, down hill from towards Buford; from the switch point to the station that is about on a level, I think. In answer to the question, isn't there a sort of a dip as you go into the station siding there, witness answers, not at that point. In answer to the question, with a car rolling if it is turned loose back in towards the station won't it roll until about the crossing and towards the depot witness answers, no, not that far I don't think. That switch point you could see from the south all right if you was outside of the office. Any member of the crew looking towards the switch point could have seen it I think; any man down about the engine could have seen it too, and he could have seen that it was turned to the side track from the red side of it; nothing to keep any one of them from doing that, seeing the target if they looked down that way.

Defendant introduced in evidence plat made by C. L. Newton.

Both sides closed.

Defendants introduced rule 533, in the general rule book, under the head of enginemen, as follows:

"In approaching sidings and yards they must be especially careful as to the indication and position of all switches."

Also rule 534, of the same book under the same head, as follows:

"They will be held accountable for passing a switch which
170 is not in the right position for them. The absence of switch lights should be taken as danger signals in accordance with the General Rules."

(Here follow photographs and diagram marked pp. 171, 172, 173, 174, 175, 176, and 177.)

178 *Charge of the Court.*

Gentlemen of the Jury: William M. Miller brings this action against the Southern Railway Company, a corporation, and E. S. Hurst, and Benjamin Voils, of Fulton County, and Tom Cox, of Dekalb County, as individuals. The action is brought jointly against the defendants to recover twenty thousand (20,000.00) dollars damages for personal injuries. The plaintiff alleges, in substance, that on the 17th day of June, 1904, he was in the employment of the defendant railway company, as freight engineer, his train being No. 72, and at Armour station on that day he received an order to the effect that train No. 81 had the right of track over No. 72 between Lula and Suwanee. He alleges that, under the railway company's rule, his train was the superior train to No. 81, No. 72 being a second class train, and No. 81 being a third class train; and moreover No. 72 being north bound, which itself gave it the right of way over No. 81. He alleges therefore, that the order just mentioned gave him the right to carry his train to Suwanee. Accordingly, the plaintiff alleges that he proceeded to run to Suwanee, and that when he reached there he received another order from the defendant railway company, directing him to meet No. 81 at Buford, further north, and under this order he proceeded to meet No. 81 at Buford; that when he reached Buford he waited for further orders for about three hours, at which time he received an-

179 other order from the defendant railway company to the effect that No. 81 had been annulled between Flowery Branch and Armours. He alleges that, under the defendant railway company's rules, a train which is twelve hours late looses without any order at all all its rights, and he alleges therefore that No. 81 being over twelve hours late at all points north of Flowery Branch, the effect of the order just described in thus annulling its rights below or south of Flowery Branch effectually took No. 81 off of the road and made it a dead train and allowed the plaintiff's train to proceed on its own rights as superior train to No. 81, and without any regard to No. 81. The plaintiff further alleges that upon receiving this order he pulled out from Buford to run to Flowery Branch; that when he got to Flowery Branch and when he was about five rails away from the south switch, he discovered the fact that the switch was turned wrong, and from the main line, and so as to throw his train into the siding; that he immediately shut off his engine and put his air into emergency; that this was all he could do, in as much as No. 81 was standing in the siding at this point, and in order to avoid being killed or mangled in the impending collision, and constrained by the emergency to do so, the plaintiff alleges that, in the exercise of due care, he jumped from the engine, and in doing so was greatly and permanently injured. He further alleges that in a few seconds after his jump the engine collided with a terrific crash upon the side track. Plaintiff alleges further that he was free from fault. Plaintiff alleges that the defend-

180 ant Cox was conductor of No. 81, and had entire charge of the crew; that defendant Voils was the engineer, and the defendant Hurst front brakeman of said No. 81, and each of these

individual defendants represented the defendant railway company in the operation of said train No. 81, and in placing No. 81 on said track at said station and in leaving open said switch at said point. He alleges that it was the duty of all the defendants to have the switch turned so as to keep plaintiff's train on the main line, and that each and all the individual defendants representing the Southern Railway Company, participated in the turning wrong of said switch, and after turning it wrong negligently permitted it to stay turned away from the main line. Plaintiff alleges that the said switch was turned to the siding by Hearst, the brakeman, and No. 81 went into the siding, and said Hearst negligently failed to turn said switch back to the main line, and said Hearst represented the defendant railway company in these particulars, and that it was the duty of Hearst to turn the switch to the main line. Plaintiff further alleges that the defendant Cox, the conductor, was under the duty to see that the switch was turned right, and that said Cox negligently failed to look after said switch after No. 81 was in the siding, and that said Cox negligently concurred with that of the defendant railway company. He alleges that the defendant Voils the engineer, and that after his engine got into the siding Voils, in the exercise of ordinary care, must have known that said switch was turned
181 wrong, and that he failed to exercise ordinary care to report the same to the other members of the crew. Plaintiff alleges further that it was negligence in the three individual defendants to unlock and cause to be unlocked the said switch, and to cause the same to be turned away from the main line, and that their negligence was the negligence of the defendant railway company, in as much as they represented the defendant railway company, in the operation of its train. Plaintiff further alleges that it was negligence in the three individual defendants, in representing the defendant railway company, not to discover that said switch was thrown wrong, it being perfectly patent and visible. The plaintiff alleges that the three individual defendants, as representing the defendant railway company, owed to the plaintiff the duty to have said switch turned to the main line, and said defendants were negligent in not doing so. He alleges that with said switch turned wrong the three individual defendants, as representing the defendant railway company, should have flagged the plaintiff's train. The plaintiff sets forth that he was injured in a number of particulars, as described in his declaration, which you will have out with you. The defendant filed a plea, the effect of which is to deny all of the allegations of plaintiff's petition. The effect of this plea is to put the burden upon the plaintiff to make out the allegations of his declaration by a preponderance of the testimony. You will have the plaintiff's declaration out with you, and the defendant's plea,
182 which you can read for yourselves, in order to see more clearly the allegations of the plaintiff upon the one side, and those of the defendants upon the other. The petition of plaintiff and the answer of defendant constitute the pleadings and merely state the contention of the parties to the case, and are not evidence except when an allegation is made by the plaintiff, which allegation

is admitted as being true by the defendant; of course, then you would take that statement then as true. So you will see, gentlemen of the jury, that the plaintiff and defendant are at issue; and it is the duty of the jury to determine and settle that issue, in favor of either the plaintiff or defendant, by the rendition of a true verdict according to the law as given you in charge and the opinion you entertain of the evidence produced to you to the best of your skill and knowledge without favor or affection to either party. By a preponderance of evidence is meant that superior weight of evidence upon the issues involved in the case, which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue, rather than to the other.

I charge you further gentlemen, that in determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testified, and the probability or improb-
183 ability of their testimony, their interest or want of interest, and also their personal credibility so far as the same may legitimately appear from the trial. The jury may also consider the number of witnesses, though the *though the* preponderance is not necessarily with the great number. In this connection, gentlemen of the jury, I charge you that you ought to reconcile the evidence in the case so as to impute perjury to no witness, it being one of the rules of law that the jury should not impute perjury to a witness. Where there is a conflict in the evidence, it is the duty of the jury to reconcile that conflict so as to make all the witnesses in the case speak the truth, if the jury can do so. If you find, however, a conflict in the testimony, and find that conflict irreconcilable, then it is your duty to believe that witness, or those witnesses in the case, that you think best entitled to belief, looking to the manner of the witness on the stand, the relation of the witness to the case, the relation of the witness to the parties in the case, the reasonableness or unreasonableness of the testimony that they relate, the credibility of the witnesses; and the weight that you give to their testimony being entirely a matter for the jury.

This suit, gentlemen of the jury, is brought jointly against the defendant railway company and the three individual defendants named. It is alleged that the defendant railway company is liable to the plaintiff because of its alleged negligent acts and omis-
184 sions, the said negligent acts and omissions being alleged to have been those of the three individual defendants who were in the defendant railway company's employment. The jury are instructed that the two rules of law contained in two sections of our code governing the right of railway company employees to recover for injuries sustained from the negligence of co-servants are as follows: "If the person injured is himself an employee of the company and the damage was caused by another employee and without *or* fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."

I read from another section of our code, which is the law. "Railroad companies are common carriers, and liable as such. As such companies necessarily have many employees who can not possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employees as to passengers for injuries arising from the want of such care and diligence." The measure of duty which the railway company owed through its employees to the plaintiff for his safety was ordinary care. Ordinary care is that care which every prudent person under the same or similar circumstances would exercise. The measure of duty which the plaintiff owed to the defendant railway company was ordinary care, and ordinary care in his case is defined to be that care which every prudent person would exercise under the same or similar circumstances. At the same time the plaintiff in
185 order to recover against the railway company must have been free from fault himself. Without fault means, that the party suing must not have done anything to contribute to the injury, or must have done everything to prevent the consequences of the company's negligence, if any. The plaintiff being an employee himself must be free from fault in order to recover. If he immediately, or remotely, directly or indirectly, caused the injury, or any part of it, or contributed to it at all, he is not entitled to recover. So far as the plaintiff's rights to recover against the defendant railway company is concerned, the law is that an employee who sues a railway company for injuries after proving the injuries can recover on proof of either of two facts. After proving the injury, if he proves that he was free from negligence, he can recover. Or, if after he proves the injury he proves that servants or agents of the railway company were negligent he can recover. If he proves that he was not negligent the law then presumes that the company was negligent and the burden is shifted upon the company to show that it was not negligent or that plaintiff was negligent. Proof of either of these facts by the company will prevent a recovery by the plaintiff. As to the individual defendants, the court instructs you that no presumption arises in favor of the plaintiff; the burden is upon the plaintiff to make out his case by a preponderance of the testimony.

I charge you that each of the individual defendants was
186 under a duty to exercise ordinary care to *to* avoid injury to the plaintiff. Ordinary care in the case of each of the individual defendants is that care which every prudent person would have exercised under the same or similar circumstances. You have a right to look to the testimony to show the particular position which each of the individual defendants occupied upon this train, and what, if any, duties were encumbered upon all or any of the individual defendants in determining whether ordinary care has been exercised. If any of the individual defendants have failed to exercise ordinary care, and on account of such failure the plaintiff was injured, and if you believe that the plaintiff was free from fault and in exercise of ordinary care then such individual defendant, or individual defendants, would be liable to the plaintiff in damages. I further charge you, gentlemen, that a railroad com-

pany has a right to promulgate reasonable rules for the government of its employees in the discharge of their several duties. An employee of a railway company is bound by all reasonable rules of the company which have been promulgated and communicated to him, or of which such employee has knowledge. If an employee under such conditions violates a rule of the company, and such violation contributes to the injury sustained there can be no recovery. On the other hand, a violation of a rule which in no way contributes to an injury would not defeat a recovery, nor would the violation of a rule which was not communicated to the employee or of which he had no knowledge defeat a recovery. I charge you further,
187 gentlemen, that if the plaintiff, by ordinary care, could have avoided the injury to himself, he can not recover at all against any of the defendants. If, on the other hand, you believe that the plaintiff was free from fault, and if you believe that he was in the exercise of ordinary care; that is, the care which every prudent man under the same or similar circumstances would have exercised—and if you believe that he was injured by the negligent of the defendant, or any of them, then the plaintiff would be entitled to recover such damages as he has shown to have sustained against such of the defendants as the testimony shows are liable to him. The defendant railway company is alleged to have been liable through the acts of the individual defendants as its employees. If you find from the evidence that the individual defendants, or any of them, were employees of the defendant railway company upon the occasion in question and were acting within the general line of their duties, such employees, or any of them, were negligent and such negligence caused injuries to the plaintiff, then the defendant railway company would be liable. I further charge you that such individual defendant or defendants, as representing the defendant railway company, caused said injury by his or their negligence, if any, would also be liable. The jury are instructed that in order for the plaintiff to recover, he must recover on some or all of the allegations of negligence set forth in the petition. He can not recover upon any state of facts not alleged in his petition.

I further charge you that the existence or non existence of
188 negligence is peculiarly a question for the jury. The court can not state or group together particular facts and characterize their existence or absence as either negligence or diligence. It is entirely for the jury to say what particular state of facts may constitute negligence. The court can give you the standard, but you are to apply that standard to the facts of the case in drawing any conclusion of negligence, and the court can not do so for you. So as to whether or not there was negligence, or whether or not there was diligence, are questions of fact for the jury. The jury are further instructed as to the defendant railway company, such railway company would be liable for the negligence, if any is shown, of the individual defendants, if such individual defendants were its employees in charge of the train upon this occasion, provided such negligence, if any be shown, caused injury to the plaintiff; but as to the individual defendants there would be no liability upon

any of such individual defendants unless the proof showed them, or any of them, to be negligent and that such negligence caused or contributed substantially to the plaintiff's injury. I will now give you gentlemen of the jury, instructions upon the measure of damages. If you find for the defendants there would be no need to consider the instructions about to be given you on the measure of damages; but if you find for the plaintiff, it will be your duty to assess his damages and the instructions now about to be given
189 would in that event be appropriate. Damages are given as compensation for the injury sustained, and generally this is the measure where the injury is of a character capable of being estimated in dollars and cents. The plaintiff in this case claims damages for pain and suffering, for doctor's bill, for lost of time and for permanent injury which he alleges destroys or impairs his capacity to labor and earn money. If under the evidence and rules of law given you in charge you should find that the plaintiff is entitled to recover, the plaintiff would be entitled to recover for pain and suffering and for this the law has no fixed standard, but says that is to be governed by the enlightened conscience of an impartial jury, seeking to be fair and just to both parties and not oppressive.

If you believe from the evidence as necessary consequence of plaintiff's injury he incurred physician's bills and medical expenses, and if you believe the amount reasonable and just you would be authorized to award the amount thereof, and if he lost time you would be authorized to award that, as may be disclosed by the evidence.

If you find that the defendant or defendants are liable, it will be your duty to fix the measure of the plaintiff's damages. Among other things he claims that he has been permanently injured; that his capacity to labor and earn money has been decreased, and that his condition will continue to the end of his life. If this contention has not been proved to your satisfaction, you will have no occasion to consult the tables concerning the use of which you
190 will presently be instructed, and should disregard them entirely. But if you find that the defendant or defendants are liable, and should believe from the evidence that the plaintiff was capable of earning by his labor so much per year, and, because of personal injuries wrongfully inflicted upon him by the defendant, his earning capaci'y has been materially reduced; and if the injuries were of such a permanent and lasting character that this decreased capacity to earn money will continue through life the following instructions will be pertinent:

Certain tables are in evidence before you. One of them is the Carlisle mortality table, and the other is a table showing the value of annuities. We will call the first the mortality table, and the second, the annuity table. They are not binding upon you, and you are not obliged to use them, or either of them. If you use neither, you need not consider the instructions now about to be given; but as these tables are in evidence, and you have the right to avail yourselves of the assistance to be derived from them, it becomes proper to explain them, and inform you in what manner, and for what

purpose, each can be made serviceable. Care, however, must be taken to avoid confusion, and you should be very particular not to use one of them where the other ought to be used. You are also cautioned that you can not advantageously use both in one and the same calculation. While the proper use of these tables separately
191 ought to lead to the same result, using them conjunctively or indiscriminately in the same calculation, or without understandng the real purposes they are respect*ful*ly intended to subserve, will surely lead to error.

You should ascertain from the evidence the annual loss which has been occasioned to the plaintiff by reason of his injuries. To do this, you will have to take into consideration his earning capacity before he was injured, and the per cent. (or ratio) in which that capacity has been diminished. Seek honestly to reach just conclusions from the facts before you as to what amount would have fairly represented the yearly earnings of the plaintiff to the end of his life, had he not been injured, and as to the proportion—whether one fourth, one half, or more than less than these fractions—in which such earnings will be reduced because of his injuries. In estimating what would have been the plaintiff's probable earnings through life, if his laboring capacity had remained unimpaired, you should give due weight to the various contingencies that will be pointed out to you before concluding these instructions. It is proper to remark, just here, that the plaintiff's age at the time he was injured, and his then probable expectancy of life, may be considered in arriving at what would have been his average yearly earnings but for the injury, if in your opinion in view of all the evidence, his earning capacity would have varied at different periods of his life, in case there had been no injury.

192 Another and more direct use which you can make of the figures representing such probable expectancy of life will presently be stated. In fixing upon this expectancy, you may consult the mortality table, which will now be explained. This table is designed to show the expectancy of life which may be entertained by average persons of given ages. The only material information you can derive from it is, the time which an average person of equal age with the one under consideration in the present case may be expected to live. This table has two sets of columns, marked, respect*ful*ly, "Age" and Expectation Years." If it should be desired to ascertain how long a person of average health and constitution, aged 33 years, would probably live, you would look for the figures "33" in the "Age" column; and opposite these figures, in the "Expectation years" column, on the right of the "Age" column, you would find the figures "32.36," which would indicate that such a person probably had thirty two and 36-100 years to live. In the nature of things, there can be no certainty whether any particular individual will live for a longer or shorter period than the probable expectancy of an average person of his age, as laid down in this table. In estimating the probable length of a given man's life, as compared with the average duration of life of one of the same age, his health, occupation, habits and surroundings, just as they are disclosed by the evi-

dence, ought to be considered, and the proper weight should
193 be given to all of these things in fixing the expectancy of the life—diminishing or increasing the figures laid down in the table according to the facts in the particular case under investigation. The age "33 years" has been selected merely for illustration. You, of course in using the table, would select the age appropriate to the present case.

Having from the evidence fixed, as accurately and as fairly as you possibly can, upon the number of dollars representing the yearly loss in earnings occasioned to the plaintiff by his injuries; and having ascertained from the mortality table, in connection with all the other evidence before you, his expectancy (that is, the number of years which, at the time of his injury, he could reasonably have expected to live) you could by multiplying one of these numbers by the other, determine approximately the gross amount of the loss.

This gross amount, when ascertained, would, of course, have to be reduced to its present value—that is—to sum which paid down all at once, would be the just and legal cash equivalent of such gross amount. The present value would necessarily be less than the gross amount; and the longer the life, the greater would the difference — in these respective sums. If you pursue the course above indicated, and arrive at the gross amount in the manner which has just been explained to you, it would then be incumbent upon you to make the necessary calculations for ascertaining its present cash value. But in as much as the proper result can be more readily reached by availing yourselves of the work which has been done in com-
194 piling the annuity table, you may prefer to resort to it. In that event, you would not find it necessary to arrive at a gross amount, and then reduce it to present value; for the use of the annuity table enables you to accomplish the same end by a shorter process. The following illustration will aid you in understanding how to use this table:

Suppose a man 33 years old, and capable of earning $40 per month, or $480 per year, was so injured that he could earn only $20 per month, or $240 per year, at that this decreased capacity to earn money would last during his entire life. If it was certain that, but for the injuries, he would have continued to earn the full amount of $480 every year as long as he lived, his loss on account of injuries would represent a yearly annuity of $240; and, if entitled to recover for such loss, his damages, as to this matter, should be such an amount as would be the fair cash equivalent of an annuity of $240, payable in annual installments, until the end of his life.

To arrive at such an amount in the case supposed, the annuity table could be made available in the following manner: First, you would look in the column marked "Age" until you found the figures "33". Opposite these figures you would find, in a column marked "7 per cent." (it being on the right of the "Age" column), the figures "11.448." The meaning is this, that an annuity of one dollar, in favor of an average person 33 years old, and to continue
195 through life, would, on the 7 per cent. basis, be worth, cash down, eleven dollars and 44 8-10 cents.

Therefore, multiplying $240 by the figures "11. -448," would give the cash value of a like annuity of $240, viz: $2,747.52.

This annuity table can be used for any age up to 103, and with reference to any sum of money representing or standing in the place of an annuity. The illustration shows you how to use the table, but you must not confuse the figures mentioned in it with the actual figures of the case now on trial. On the contrary you should be governed, as to these matters, by the evidence.

For instance, you will have noticed that the case supposed in the illustration is one where the earning capacity was reduced one half. It might be that it was reduced two thirds, or only one third, or one fourth, or any other fraction. The true per cent. of the decreased capacity must in each case be ascertained from the evidence, the question being: In what proportion does it show the ability to earn money has been lessened? You will also observe that the illustration given rests upon the assumption that the injured person would have actually earned $480 every year during the entire period of his expectancy, if he had not been hurt, and his consequent loss on account of the decrease in his ability to labor is calculated upon that basis.

It rarely, if ever, happens that a man labors every day
196 until his death, or received all the while a fixed and regular income from his labor; nor does his capacity to earn money often remain undiminished to old age. In arriving at the amount to be allowed as damages in any particular case, these things should be carefully borne in mind. The illustration given is also based upon the further assumption that the supposed person was one whose expectancy of life was that of an average man. If, in any case, the expectancy of the person under consideration would, under the evidence, have probably been greater, or less, than that of an average man, the amount of the damages to be allowed should be increased, or diminished, accordingly. In applying these instructions to the case which you are now trying you will, of course, be governed by its facts and circumstances as proved. Feebleness of health, actual sickness, the loss of employment, voluntarily abstaining from work, dullness in business, reduction in wages, the increasing infirmities of age, with a corresponding diminution of earning capacity, and other causes, may contribute, in greater or less degree, to decreasing the gross earnings of a lifetime. In estimating damages, a proper allowance and reduction should be made in favor of the defendant for any diminution in income from labor which would have resulted from any of these sources. The defendant is not responsible for the consequences of the acts of others not its agents, nor for results which would in any event, and without reference to the con-
197 duct or negligence of the defendant have come to pass.

In arriving, therefore, at the amount which should be allowed the plaintiff on account of loss arising from diminished ability to labor, you should take all these matters into consideration, and give them due weight.

If the defendant or defendants are not liable at all, the instructions which have been given concerning these tables should be disregarded entirely. If liable, and you see proper to use the tables,

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or either of them, an observance of these instructions will aid you in reaching a proper conclusion as to the amount of damages to be allowed.

I charge you further, gentlemen of the jury, that in as much as negligence charged against each of the individual defendants amounts to a charge of also negligence against the defendant railway company, in that such individual defendant is alleged to have been negligent as representing the railway company, and if you believe that such individual was an employee of said railway company, if you find any verdict for the plaintiff at all, necessarily your verdict would be against the railway company as one of the defendants. If you find all the defendants liable, you will in your verdict say we the jury find for the plaintiff the sum of so many dollars, with cost of suit. If you find the railway company and one of the individual defendants liable, you will say we the jury
198 find for the plaintiff against the defendant Southern Railway Company and name the individual defendant, the sum of so ma-y dollars, with cost of suit. If you find for the plaintiff against the Southern Railway Company and two of the defendants, the form of your verdict will be, we, the jury, find for the plaintiff against the defendant Southern Railway Company, and naming the two individual defendants against whom you find the verdict, the sum of so many dollars, with cost of suit.

If you find for the defendant, the form of your verdict will be, we, the jury, find for the defendant.

You can retire gentlemen and consider of your verdict.

The COURT: The plaintiff having withdrawn claims for doctor's bill and medical expenses you will not consider that item, and the charge upon that question is withdrawn from your consideration.

The above and foregoing approved as a true and correct charge of the court in said case, and ordered filed as a part of the record therein. This August 2" 1907.

J. C. BOONE,
Judge C. C. H. C.

199 We, the jury find for the plaintiff Ten Thousand Dollars, (10.000) and costs of suit.

F. L. BEARD, *Foreman.*

Whereupon it is ordered and considered and adjudged that the plaintiff William M. Miller do recover of the defendants, the Southern Railway Company, Ed S. Hurst, Benjamin Voils and Tom Cox, the sum of Ten Thousand Dollars ($10.000.00) principal, and Twenty Six Dollars as costs of suit. This 25th day of May, 1907.

R. R. ARNOLD,
ALONZO FIELDS,
HOWARD THOMPSON,
FLETCHER M. JOHNSON,
Plaintiff's Attorneys.

GES

200 At May Term, 1907, of Hall City Court, on the 24th Day of May, 1907.

W. M. MILLER
vs.
SOUTHERN RAILWAY CO., ED. S. HURST, BENJAMIN VOILS & TOM COX.

Verdict and Judgment for Plaintiff.

The defendants being dissatisfied with the verdict and judgment in said case, comes during said term of court, before the adjournment thereof, and within 30 days from said trial and moves the court for a new trial, upon the following grounds towit:

1st. Because the verdict is contrary to evidence and without evidence to support it.

2nd. Because the verdict is decidedly and strongly against the weight of evidence.

3rd. Because the verdict is contrary to law and the principles of justice and equity.

Whereupon he prays that these his grounds for a new trial be inquired of by the court, and that a new trial be granted him.

JNO. J. STRICKLAND,
C. R. FAULKNER,
ED. QUILLIAN,
Attorneys for Movant.

Read and considered. It is ordered that the plaintiff show cause before me, at Gainesville, Ga., at 2.00 p. m. o'clock on the 24th day of June, 1907, why the foregoing motion should not be granted. It is further ordered that the plaintiff be served with a copy of this motion and order; and that this order act as a supersedeas
201 until the further order of the court. This 25th day of May, 1907.

J. C. BOONE,
Judge C. C. H. C.

May Term, 1907, of City Court of Hall County.

W. M. MILLER
vs.
So. Ry. Co. et al.

Verdict and Judgment for Plaintiff.

The defendants having made a motion for new trial in said case, on the grounds therein stated, and said grounds having been approved by the court, and it appearing that it is impossible to make out and complete a brief of the testimony in said case before adjournment of court; it is ordered by the court that said motion be

heard and determined on the 24th day of June in vacation at Gainesville, Ga., and that movant may amend said motion at any time before the final hearing.

If for any reason said motion is not heard and determined at the time and place above fixed, it is ordered that the same shall be heard and determined at such time and place in vacation as counsel may agree upon, and upon failure to agree, then at such time and place as the presiding judge may fix on the application of either party, of which time and place the opposite party shall have at least five days' notice.

If for any reason this motion is not heard and determined
202 before the beginning of the next term of this court, then the case shall stand on the docket until heard and determined at said term or thereafter.

It is further ordered that the movant have until the hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time either in term or vacation, and if the hearing of the motion shall be in vacation and the brief of evidence has not been filed in the clerk's office before the date of the hearing, said brief of evidence may be filed in the clerk's office at any time within ten days after the motion is heard and determined. This 25th day of May, 1907.

J. C. BOONE,
Judge C. C. H. C.

GAINESVILLE, GA., *June* 24, 1907.

This motion having been set for a hearing this day, and counsel for both parties agreeing thereto, it is ordered that the hearing be continued until the 24th day of July, 1907, during the second week of Hall Superior Court; and it is further ordered that everything remain in statu quo until said 24th day of July, with all rights to the parties as contained in original order as to said motion.

J. C. BOONE,
Judge C. C. H. C.

203 In the City Court of Hall County.

W. M. MILLER
vs.
SOUTHERN RY. CO. et al.

Now come all the defendants in the above case, and by permission of the court amend their motion for new trial by adding thereto the additional grounds:

IV.

Because the court erred in allowing the following question asked and answered, over the objection of defendants' counsel, made at the time, to wit: "Q. Just taking the average engineer, running as

you do—up and down the road when you have a right over another train you do not expect to find the switch turned? A. No, sir."

The objection being made at the time that the engineer was bound by the rules, and what he expected was inadmissible. The court ruled as follows: "In view of the direct examination I permit him to ask that question."

V.

Because the court erred in allowing the following questions asked and answered over the objection of defendant's counsel, to wit: "Here runs your track and here is a curve and here runs the siding by it, and the switch comes into the main line in a cut, a curve like that and here is your depot and your semaphore signal up there, you can not see the semaphore signal at all until you get past the switch point around out of the curve, would you consider that
204 rule to mean that you ought to come there prepared to stop at this switch point, read any of those rules that he read? A. The rule that you must approach sidings and yards they must be especially careful. Q. Do you do that? A. No, sir. Q. Do you know of any other engineer that does it? Q. Take all the engineers on the road, the general custom and practice, would they come to that switch point prepared to stop if they had no orders? A. No, sir, I don't think so."

The objection being that the evidence solicited was in violation of the rules in evidence, and was not admissible unless it was shown that the officials of the railroad promulgating the rules knew the same were disregarded and acquiesced therein.

VI.

Because the court erred in refusing to give in charge to the jury the following written request handed the presiding judge as required by law:

"Defendants request the following charges:

"1. In this case plaintiff has brought his suit against the So. Ry. Co., and Voils and Cox and Hurst as joint defendants. Plaintiff must recover, if at all, against all of these defendants. Should it appear to your satisfaction from the evidence under the law that one or more of these defendants was liable, but all were not, then it would be your duty to find a verdict for the defendants, as they are sued jointly, and a verdict must go against all or for all.

205 "2. I further charge you that a railroad company has the right to, and it is its duty to promulgate rules for the government of its employees in the discharge of their several duties. When such rules are promulgated, it is the duty of the employees to obey them, and a failure to do so, if such failure is the approximate cause of an injury resulting to such employee, he can not recover.

"3. The defendant has introduced before you rule 533, which reads as follows: "In approaching sidings and yards they must be especially careful as to the indication and position of all switches."

The defendant has introduced before you rule 534, which reads as follows: "They will be held accountable for passing a switch which

is not in the right position for them. The absence of switch lights should be taken as a danger signal in accordance with the General Rules."

They have also introduced Special Rule "J", which reads as follows: "Freight trains must approach all stations, water tanks and coaling platforms under control." This does not mean that freight trains must necessarily stop, but they must approach stations, water tanks and coaling platforms under control, and prepare- to stop. This does not relieve flagmen from the proper performance of their duties."

"I charge you that these are reasonable rules, and are binding upon the employees."

206 "4. In order for plaintiff to recover in this case, being an employee, he must be free from fault. If the injury sustained by him was caused by reason of a violation of any rule of the company in force at the time, he would not be entitled to recover.

"5. One rule introduced requires that an engineer in approaching sidings and yards must be especially careful as to the indication and position of all switches. If you believe from the evidence in this case that the plaintiff in approaching the switch by the exercise of care could have discovered that the switch had been turned wrong and failed to exercise such care, and in consequence thereof was injured, then he can not recover.

"6. Another rule provides that a freight train must approach all stations, water tanks and coaling platforms under control. If you believe from the evidence, in this case, that the plaintiff did not approach the station where he was hurt with his train under control, and in consequence thereof was injured, then he can not recover.

"7. If you believe under the evidence in this case, that the switch was turned wrong, and the switch target so indicated, and you further believe that had plaintiff been on the lookout he could have discovered this in time to have stopped his train before the collision, then I charge you that he can not recover.

"8. If you believe from the evidence in this case, that the plaintiff, by being especially careful, could have discovered the

207 switch was turned to the siding by the indication and position of the switch or the target thereof, and that he did not so discover such switch being turned in consequence of a failure on his part to be especially careful as to the indication and position of the switch, and thereby was hurt, that he can not recover.

"9. If you believe from the evidence in this case that the plaintiff did not discover the position of the switch until he was then so short a distance that he could not then stop his train, but that he could have seen the position of the switch, by looking therefor, at a point sufficiently therefrom so that he could have stopped his train before noticing the switch, then I charge you that he can not recover.

"10. Rule 534 introduced before you provides: "They will be held accountable for passing a switch which is not in the right position for them."

I charge you that this rule prohibits plaintiff from recovering in this case at all, if you believe that the switch was wrong for plaintiff, and the same was indicated by the switch target and plaintiff ran past it into the siding, and was thereby injured.

"12. Should you determine under the law and evidence the plaintiff is entitled to recover, then in arriving at the amount you may consider any evidence in the case to the effect that the plaintiff, as an engineer, had been paid a larger salary in consequence of
208 the risk he took of danger to himself by running on an engine.

"13. If you believe from the evidence in this case that the plaintiff, as a locomotive engineer, was paid a salary greater than as a station- engineer of the same ability and duties to perform, and that this difference or any part of it, was paid in consequence of the risk a locomotive engineer takes, then you would be authorized to reduce the amount you should find plaintiff as entitled to recover, by whatever amount had thus been paid for the risk in his employment.

"14. In determining whether or not the plaintiff has been permanently injured, you may take into consideration his appearance, his evidence, and that of the other witnesses, and all that appeared in your presence during this trial, including the fact that the plaintiff declined to have himself now examined."

VII.

Because the court erred in charging the jury as follows:

"The jury are instructed that the two rules of law contained in two sections of our code governing the right of railway company employees to recover for injuries sustained from the negligence of co-servants, are as follows: "If the person injured is himself an employee of the company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."

I read from another section of the code, which is the law.
209 "Railroad companies are common carriers, and liable as such. As such companies necessarily have many employees who can not possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employees as to passengers for injuries arising from the want of such care and diligence."

The error being that the statute thus charged was calculated to have the jury believe the same rule applicable to the defendant railroad was applicable to the other defendants.

VIII.

Because the court erred in charging the jury as follows:

"An employee of a railway company is bound by all reasonable rules of the company which have been promulgated and communicated to him, or of which such employee has knowledge. If an employee, under such conditions, violates a rule of the company, and such violation contributes to the injury sustained, there can be no recovery. On the other hand, a violation of a rule which in no

way contributes to an injury would not defeat a recovery, nor would the violation of a rule which was not communicated to the employee, or of which he had no knowledge, defeat a recovery."

The error being:

1. There is no evidence, as movant contends, to authorize the latter part of the charge.

2. The language: "nor would the violation of a rule
210 which was not communicated to the employee or of which he had no knowledge, defeat a recovery," would lead the jury to hold an engineer harmless although a rule book was in his possession, and he had full opportunity of familiarizing himself with it, but failed to do so.

IX.

Because the court erred in charging the jury as follows:

"The defendant railway company is alleged to have been liable through the acts of the individual defendants as its employees. If you find from the evidence that the individual defendants, or any of them, were employees of the defendant railway company upon the occasion in question, and were acting within the general line of their duties, such employee, or any of them, were negligent and such negligence caused injuries to plaintiff, then the defendant railway company would be liable. I further charge you that such individual defendant, or defendants, as representing the defendant railway company, caused said injury, by his, or their, negligence, if any, would also be liable."

The error being that the charge makes the defendant, the servant, jointly liable with the defendant, master, for the negligence of the servant, regardless of its character.

X.

Because the court erred in overruling defendant's motion to continue said case, and in forcing defendants to trial. Said motion being predicated, so counsel stated in court, upon the provi-
211 dential absence of Ed Quillian, and counsel stated he was local counsel of defendant for Hall County, and the local counsel upon which defendant relied in procuring a jury, and for local influence. Movant's counsel stated to the court the fact of said Quillian's providential absence was known to the presiding judge, to which the judge bowed assent. The said Quillian being absent attending a relative's funeral, which fact was not controverted. Messrs. Strickland and Faulkner were present in court as attorneys representing defendants, and no claim was made that Mr. Quillian was leading counsel in the case. Said Quillian casually met the presiding judge on the street during recess of court, and stated that his cousin had died and he was preparing to leave, but made no request for leave of absence from the court.

XI.

Because the court erred in refusing to rule upon a motion to grant a continuance on account of the absence of Hurst, one of the defendants, whose presence was expected, but at the instance of plaintiff's

counsel postponed the case for twenty-four hours on the promise of plaintiff to have said Hurst present. Hurst appeared the next day and was sworn as a witness.

XII.

Because the verdict is excessive, and so excessive as to justify the inference of gross mistake or undue bias.

Wherefore they pray that these grounds of the amended
212 motion be certified and made a part of the motion.

JNO. J. STRICKLAND,
ED. QUILLIAN,
Att'ys for Movant.

The recitals of fact in the foregoing amended motion are true, it is hereby made part of the motion for new trial. This Aug. 2nd, 1907.

J. C. BOONE,
Judge C. C. H. C.

W. M. MILLER
vs.
So. RY. Co. et al.

13.

Because of the newly discovered evidence contained in the affidavits of W. L. Hawkins, C. R. Parsons, and J. D. Cobb hereto attached and made part of the amended motion. Wherefore they pray that a new trial be granted.

C. R. FAULKNER,
ED. QUILLIAN,
JNO. J. STRICKLAND,
Movant's Att'ys.

Motion for New Trial, Pending in the City Court of Hall Co., Ga.

W. M. MILLER
vs.
So. RY. Co. et al.

GEORGIA, *Hall County:*

Personally came before the undersigned, an officer of said State and county authorized to administer oaths, W. L. Hawkins, who being duly sworn said: I know W. M. Miller. I reside
213 at Flowery Branch, Georgia. About two months after W. M. Miller got hurt at Flowery Branch, he came down on No. 11, and got off the train; his wife was with him. It was dark and raining; they walked off down the railroad. Mr. Miller walked natural. After awhile they returned, and told me they had been down to Rev. J. L. Phillips, but it was so dark that they could not find the

house. I sent them back in a buggy. This affidavit is made to be used on the hearing of the motion for new trial in the above stated case.

W. L. HAWKINS.

Sworn to and subscribed before me, this July 31, 1907.
J. A. MOONEY, *N. P. & J. P.*

Motion for New Trial, Pending in the City Court of Hall Co., Ga.

W. M. MILLER
vs.
So. Ry. Co. et al.

GEORGIA, *Hall County:*

Personally came before the undersigned, an officer of said State and county authorized to administer oaths, C. R. Parsons, who being duly sworn said: I know W. M. Miller. About 2 months after he got hurt at Flowery Branch, Ga., Mr. Miller and his wife got off the train at Flowery Branch and walked off down the railroad. He wanted to borrow a lantern to find the way to Rev. J. L. Phillips. He stated that he and his wife had been down about the branch, about one mile from the station house, and got lost. I insisted on his getting a team out at the stable and he did so.
214 It was very dark and raining. He said I can walk it all right if I had a light. This affidavit is made to be used on the hearing of the motion for new trial in the above stated case.

C. R. PARSONS.

Sworn to and subscribed before me, this July 31, 1907.
J. A. MOONEY, *N. P. & J. P.*

Motion for New Trial, Pending in the City Court of Hall.

W. M. MILLER
vs.
So. Ry. Co. et al.

GEORGIA, *Hall County:*

Personally came before the undersigned, an officer of said State and county, authorized to administer oaths, J. D. Cobb, who being duly sworn said: I am a practicing physician and know W. M. Miller, the plaintiff in the above case. On the day Miller was hurt by jumping from an engine at Flowery Branch, he came to my house at Flowery Branch, Ga., and I examined and dressed his ankle. He said he was not hurt anywhere except his ankle and knee which had a small abrasion, and that it did not seem to be a serious injury. After it was dressed he went off on train No. 39 when it came. From the appearance of Miller and what he said at the time I did not think he had sustained any injury except that

to his ankle and knee, and that I considered slight, and from that he should have recovered in a short while.

215 This affidavit is made to be used on the hearing of the motion for new trial in the above case.

J. D. COBB.

Sworn to and subscribed before me on the 31 day of July, 1907.
J. A. MOONEY,
N. P. & J P.

W. M. MILLER
vs.
So. RY. Co. et al.

Motion for New Trial, Pending in the City Court of Hall Co., Ga.

GEORGIA, *Hall County:*

Personally came before the undersigned, an officer of said State authorized to administer an oath, W. A. Crow & J. D. Deaton, who being duly sworn said: I know C. R. Parsons and W. L. Hawkins; they are men of good character and worthy of belief.

This affidavit is made to be used on the hearing of the motion in the above stated case.

W. A. CROW.
J. D. DEATON.

Sworn to and subscribed before me, this July 31, 1907.
ED. QUILLIAN,
N. P., Hall County, Ga.

216 M. M. MILLER
vs.
So. RY. Co. et al.

Motion for New Trial, Pending in the City Court of Hall Co., Ga.

GEORGIA, *Hall County:*

Personally came before the undersigned, an officer of said State and county authorized to administer an oath, W. N. Dyer and W. B. Smith, each of whom being sworn said: I know Dr. J. D. Cobb; he is a man of good character and is worthy of belief.

This affidavit is made to be used on the hearing of the motion for new trial in the above cause.

W. N. DYER.
W. B. SMITH.

Sworn to and subscribed before me, this July 31, 1907.
ED. QUILLIAN,
N. P., Hall County, Ga

GEORGIA, *Hall County:*

Personally came before the undersigned, an officer of said State and county authorized to administer an oath, C. R. Faulkner, Ed Quillian and Jno. J. Strickland, each of whom being sworn said: We had exclusive management of this case of W. M. Miller vs. So. Ry. Co. et al., tried at the May term, 1907, of the City Court of Hall County, for the defendants, neither of us knew of the facts contained in the affidavits of C. R. Parsons, W. L. Hawkins and J. D. Cobb, until after said case was tried, and in the nature of things
knew that no agent of the So. Ry. Co., or other defendants
217 could have known the same, nor could such information have been obtained by any kind of diligence.

JNO. J. STRICKLAND.
C. R. FAULKNER.
ED. QUILLIAN.

Sworn to and subscribed before me, Aug. 2, 1907.

J. C. BOONE,
Judge C. C. H. C.

The recitals of fact in the foregoing amendment are true. It is ordered that they be allowed as part of the motion. This Aug. 2, 1907.

J. C. BOONE,
Judge C. C. H. C.

The within motion for new trial coming on to be heard before me on Aug. 2, 1907, at Gainesville, Ga., being the time and place fixed by previous orders of the court; and after hearing and considering said motion, the decision of the court was held up for future determination; said motion for new trial is now taken up for final determination and decision, and it is ordered by the court that said motion for new trial be and the same is hereby overruled, and a new trial refused. This Aug. 19, 1907.

J. C. BOONE,
Judge C. C. H. C.

218 Clerk's Office, City Court of Hall County.

GAINESVILLE, GA., *Sept.* 30, 1907.

I hereby certify, That the foregoing 155 pages hereunto attached, contains a true and complete Transcript of the Record in the case of So. Rwy. Co. et al. Plaintiff- in Error vs. W. M. Miller, Defendant in Error, as specified in the original Bill of Exceptions. I further certify, That the May term of said Court, at which said case was tried, adjourned on the 30th day of May, 1907. All of which appears from the records and minutes of said Court.

Witness my official signature and the seal of said court affixed the day and year first above written.

[SEAL.]

W. B. SMITH,
Clerk City Court.

(Endorsed:) Case No. 772. Court of Appeals of Georgia. October Term, 1907. Southern Ry. Co. et al. vs. Miller. Transcript of Record. Filed in office Oct. 1, 1907. Logan Bleckley, C. C. A., Ga.

219 206.

Court of Appeals of Georgia.

Case No. 772.

SOUTHERN RAILWAY COMPANY et al.
vs.
MILLER.

By the COURT:

1. As to all questions raised in the record, except those arising from the overruling of the motion for a new trial, the cases of Southern Railway v. Miller, 1 Ga. App. 616 (57 S. E. 1090), and Southern Railway Co. v. Rowe, 2 Ga. App. 557 (59 S. E. 462) are controlling.

2. To be sufficiently specific to raise any question for determination on review, grounds of a motion for a new trial, complaining of the admission of testimony, should contain such recitals as will show with definiteness, independently of other portions of the record, the nature of the errors complained of.

3. Where a request to charge contains several distinct propositions, a ground of a motion for a new trial complaining that the court refused the request in its entirety will be held not to be well taken if any of the propositions be unsound.

4. No error appears in the instructions excepted to; nor in the refusal to continue the case.

5. It is the duty of the trial judge to be reasonably satisfied that a verdict is just and true, before he approves it; but if after
220 deliberately weighing the matter, his mind and conscience does approve it, any slight dissatisfaction or doubt through which he may have passed, and to which he may have given expression in discussing the matter, preliminary to a decision, will not operate to relieve the verdict of that element of finality to which, when approved, it is entitled as a finding of fact.

POWELL, *J.*:

1. The same questions made by the demurrer and by the special plea were decided adversely to the plaintiff in error in the cases of Southern Ry. Co. v. Rowe, 2 Ga. App. 557 (59 S. E. 462), and So. Ry. Co. v. Miller, 1 Ga. App. 616 (57 S. E. 1090).

2. In the motion for a new trial error is assigned upon the admission of certain testimony. The grounds are not sufficiently full and specific to indicate definitely the nature of the error complained of, and therefore present no question for determination by this court.

3. One of the grounds of the motion complains: "The court erred in refusing to give in charge to the jury the following written request; handed the presiding judge as required by law." This is followed by a request to charge fourteen distinct propositions, some of which at least were not proper to be charged. We are not prepared to hold, as was insisted by counsel for defendant in error, that the form in which the request was submitted had the effect of
221 making these requested charges an entirety, so that an error in one paragraph would so vitiate all the others as to excuse the judge from charging such of them as were legal and purtenant; yet it is plain that the exception now taken is an entirety. In other words, counsel could have assigned error upon each of his requested charges by a separate assignment, and thus have brought under review the refusal of each request as a segregate proposition; this he did not do, but has elected to stand or fall by the whole. The rule as to exceptions of this character is too well established by the Supreme Court to deserve further discussion here.

4. Complaint is also made of certain instructions given. Upon comparing them with the evidence and the charge as a whole we find no error in any of them. The question whether the court should have continued the case for the absence of local counsel, when the general and leading counsel for the defendant was present, was a matter addressed largely to the discretion of the trial judge; and in this case we are unwilling to say that he abused it.

5. It is contended that the verdict is contrary to the evidence and that it is excessive. It is further said, in this connection, that it is not approved by the trial judge. The verdict is not contrary to the evidence; and while it is large, it is not so large as to justify us in declaring it as a matter of law excessive. As to the approval of the trial judge, we find that he, by an unqualified order,
222 overruled the motion for a new trial, containing the general grounds, thereby formally expressing his approval of the verdict. The following assignment of error is, however, verified by the bill of exceptions: "The court erred in holding, in passing on said motion for new trial, that while he was not exactly satisfied with the amount of the verdict rendered in this case, yet what amount the court would have given is not the controlling question, but the amount was a question for the jury under the charge of the court; and the jury having determined the amount, a new trial would not be granted because of the amount of the verdict alone." If the judge was so dissatisfied with the amount of the verdict that the persuasive influence of the jury's finding—the deliberate opinion of twelve impartial men who also heard the evidence—did not convince him that the amount was reasonably correct, it was his duty to set it aside. In the nature of things no man's mind can fix with exactness upon the amount of damages to be allowed for personal injuries. The verdict of the jury itself is probably in most cases a compromise of the estimates of the individual jurors. No juror ought to agree to a verdict which is either so small or so large as to strike his mind and conscience as being unjust or unreasonable. In passing upon a verdict, the trial judge, on motion for a new

trial, exercises a like discretion. It is not required that he be "exactly satisfied," provided he is reasonably satisfied with the finding.

223 It is not improper that the verdict of the jury should exercise a persuasive influence upon him. The record as a whole indicates that the trial judge, before finally determining how he should exercise that discretion, which it is his positive duty to exercise, had doubts which he expressed, and which he duly weighed, but that despite his original lack of entire satisfaction he was so persuaded by the unanimous finding of the jurors that he became reasonably satisfied with the verdict and approved it. Doubt and uncertainty are not necessarily inconsistent with the complete decision of a question. The judgment can fully choose and act despite doubt. We will not construe the record as indicating that the trial judge deliberately disregarded his sworn duty by approving a verdict which his mind and conscience told him was unjust and unreasonable in amount. As against a motion for a new trial, it takes thirteen men to make a verdict. Until it has received the approval of all thirteen, it does not become a final finding of fact. But when all thirteen (though one or all, in deliberating the question, may have felt some shade of doubt) do finally assent to the same thing, the unanimous agreement of minds—the approved verdict—is final and conclusive upon all others who may thereafter have occasion to review it, as to every issue of fact legitimately involved.

Judgment affirmed.

224 Court of Appeals of the State of Georgia.

ATLANTA, *January* 15, 1908.

The Honorable Court of Appeals met pursuant to adjourment. The following judgment was rendered:

SOUTHERN RY. CO. et al.
versus
W. M. MILLER.

This case came before this court upon a writ of error from the city court of Hall county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Bill of costs, $10.00.

225 Court of Appeals of the State of Georgia.

ATLANTA, *February* 28, 1908.

I hereby certify that the foregoing pages hereto attached contain the complete record in the case of Southern Railway Company et al. v. W. M. Miller, which is forwarded to the Supreme Court of the United States by virtue of a writ of error allowed by Honorable B. H. Hill, Chief Judge of the Court of Appeals of the State of Georgia, on February 3, 1908, as appears from the records and files of this office.

Witness my signature and the seal of said court hereto affixed, the day and year first above written.

[Seal Court of Appeals of the State of Georgia, 1906.]

LOGAN BLECKLEY,
Clerk of the Court of Appeals of the State of Georgia.

Endorsed on cover: File No. 21,103. Georgia Court of Appeals. Term No. 122. Southern Railway Company, Ed. S. Hurst, Benj. Voils, and Tom Cox, plaintiffs in error, vs. W. M. Miller. Filed April 11th, 1908. File No. 21,103.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 122.

SO. R'Y CO. ET AL., PLFFS. IN ERROR, vs. W. M. MILLER.	IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

W. M. MILLER filed his suit in the Supreme Court of Hall County to the July Term, 1905, alleging, That, while in discharge of duty as an engineer of the So. Ry. Co. he had been damaged in the sum of Twenty Thousand ($20.000.00) dollars, by the negligence of said Company. A copy of his petition is as follows:

"GEORGIA, HALL COUNTY:

To the Superior Court of said County:

The petition of William M. Miller shows to the Court the following case:

I.

The defendant is the Southern Railway Company which is a railroad corporation, running a line of track in said county, and having an office and Agent therein, on whom service of process can be made.

II.

Said defendant has endamaged plaintiff in the sum of Twenty Thousand ($20.000) dollars on account of the case hereinafter stated.

III.

On the 17th day of June, 1904, plaintiff was in the defendant's employment as engineer on a freight

train. On said June 17, 1904, plaintiff was going North on freight train, No. 72. Upon leaving Atlanta, and at Armour's station, plaintiff received an order to the effect that train No. 81 had the right of track over 72 between Lula and Suwanee. It is alleged, that, under defendant's rules and regulations, the plaintiff's train, No. 72, was a superior train to No 81, the plaintiff's train being a second class train and No. 81 being a third class train, and, moreover, No. 72 being North bound and No. 81 South bound. The order aforesaid, therefore, gave the plaintiff the right to carry his train to the station of Suwanee.

IV.

Accordingly, the plaintiff proceeded to run to Suwanee and when plaintiff got to Suwanee he received another Order from the defendant's authorities, which directed him to meet No. 81 at Buford, further on the road, and under this order plaintiff proceeded with his train to Buford, where he was directed to meet No. 81.

V.

When plaintiff got to Buford, as was his duty, he waited until further Orders, and waiting something in the neighborhood of three (3) hours, at which time he received another order from the defendant's authorities to the effect that No. 81 had been annulled between Flowery Branch and Armour's station. It is alleged that under the defendant's rules, a train which was twelve (12) hours late lost all its rights, and it is alleged that No. 81 was more than twelve (12) hours late at all points north of Flowery Branch, and it is alleged that this Order, in thus annulling its rights below Flowery Branch, effectually took No. 81 off the road, and allowed plaintiff's train to proceed as a superior train to No. 81, and without regard to No. 81.

VI.

Upon receiving this Order plaintiff pulled out of Buford, and proceeded with due care to run to Flowery

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Branch. When plaintiff got to Flowery Branch, and when he was about five rails away from the south switch at said point, plaintiff discovered (which is alleged to be a fact) that the switch was turned wrong, and from the main line, so as to throw a train into the siding. Plaintiff immediately shut off his engine, and put his air into the emergency, which was all that he could do, in as much as No. 81 was standing in the siding at this point, and to avoid being killed or mangled in the collision, plaintiff, in the exercise of due care, jumped from the engine and, in doing so, was greatly and permanently injured.

VII.

The engines did collide on said side track.

VIII.

The defendant, in its agents and servants other than plaintiff, were negligent in leaving said switch open, and in causing said collision. It is alleged that it was the duty of defendant with reference to plaintiff and his train, to have said switch turned so as to keep the train on the main line. It is alleged that the defendant's employees, who constituted the crew of 81, and also the agent of said station, to-wit, Flowery Branch, turned said switch wrong, and after turning it wrong negligently permitted it to stay turned away from the main line. It is alleged that it was negligent in the members of said crew to unlock said switch and turn it on the side track. It is alleged that it was negligent in the members of said crew, and in the agent at Flowery Branch, not to discover that said switch was turned wrong, it being perfectly patent and visible, and not to turn it right after having discovered it. It is alleged that defendant owed plaintiff the duty to have said switch turned to the main line. It is alleged that, with the switch turned wrong, the members of the crew of 81 should have flagged plaintiff's train, if for any reason the switch could not be turned right. It is

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alleged that no notice was given plaintiff that said switch was turned wrong until he had reached a point on the track where he could see it, which was about—— rail lengths away.

IX.

Plaintiff was free from fault and was running upon his rights and in a manner and a way that he had a right to run.

X.

Plaintiff was permanently injured as follows: he was bruised, injured and mashed in and about his head, neck, shoulders, body, back, abdomen and limbs. His right leg, ankle and knee, the right shoulder and muscles of the right arm, were all twisted and bruised and seriously injured. The bone in the right foot and ankle were permanently dislocated and displaced. The knee joint was stretched and ruptured and is much swollen. The ligaments, nerves and muscles of the ankle were torn. The right shoulder was stretched, and the muscles thereof were torn and stretched, as were likewise the muscles and nerves of the right arm. Plaintiff's capacity to labor and earn money has been totally destroyed. He will never be able to do railroad work again. The foot, knee, ankle, and leg are stiff and weak and he cannot walk without assistance. The right shoulder and arm are weakened and he cannot exert it without pain. He has suffered and will continue to suffer great pain. All time up to the filing of this petition has been lost. Doctor's and medical bills are Two hundred ($200.00) dollars. Plaintiff was earning from One Hundred and Fifty (150.00) dollars to Two Hundred (200.00) dollars per month. He was about thirty-five (35) years old, and had an expectancy in life of 31 years, during which time his capacity to labor and earn money has been destroyed. For each and all of the foregoing items of damage plaintiff sues.

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XI.

Plaintiff alleges that the emergency upon him when he jumped was great; that a collision was threatened and actually did occur; that, in the exercise of ordinary care, it was necessary for him to jump to save his life or save great bodily injury and that such emergency and threatened collision was brought about by defendant's negligence, it being further alleged that the crew of 81 had allowed the engine to stand too close to the switch and it should have been further back in the siding.

Wherefore, plaintiff prays process may issue, requiring defendant to be and appear at the next term of this court, to answer plaintiff's complaint."

At the July Term, 1905, Hall Superior Court, the So. Ry. Co. filed its petition with the proper bond, and obtained an Order removing said case into the U. S. Circuit Court for the Northern District of Ga. The Transcript of Record was properly made, and the Railroad Company filed an answer in Sept. 1905.

On the————day of March, 1906, after said case had been removed and the U. S. Court took jurisdiction thereof by pleadings allowed, W. M. Miller dismissed hid case in the Federal Court. On March 12th, 1906, sais Miller again filed his suit in the City Court of Hall County, against the So. Ry. Co. adding Ed. S. Hurst, Benj. Voils, and Tom Cox, his co-employees, as parties defendant. A copy of this suit is as follows:

"Georgia, Hall County.

To the City Court of Hall County:

The petition of William M. Miller shows to the Court the following case:

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1.

The defendants hereto are the Southern Railway Co. which is a railroad corporation, running a line of track in said county, and Ed S. Hurst, of Fulton County, Ga., Benjamin Voils, of Fulton County, Ga., and Tom Cox, of DeKalb County, Ga.

2.

The said defendants have endamaged plaintiff in the sum of Twenty Thousand ($20.000.00) dollars on account of the case hereinafter stated, the injury occurring in Hall Co., Ga.

3.

On the 17th day of June, 1904, plaintiff was in the employ of the defendant Railway Co. as engineer on a freight train. On said June 17, 1904, plaintiff was going North on Freight Train No. 72. Upon leaving Atlanta and at Armour's station, plaintiff received an Order to the effect that train No. 81 had the right of track over No. 72 between Lula and Suwanee. It is alleged that under the defendant railway's rules and regulations, the plaintiff's train No. 72, was a superior train to No. 81, plaintiff's train being a second class train and No. 81 being a third class train, and moreover, No. 72 being North bound, which gave it the right of way over No. 81 which was South bound. The order aforesaid, therefore, gave the plaintiff the right to carry his train to the station of Suwanee.

4.

Accordingly the plaintiff proceeded to run to Suwanee, and when the plaintiff got to Suwanee, he received another order from the defendant railway's authorities, which directed him to meet 81 at Buford, further up the road, and under this order plaintiff proceeded with his train to Buford where he was directed to meet No. 81.

5.

When plaintiff got to Buford, as was his duty, he waited until further orders, and waited in the neighbor-

hood of three hours, at which time he received another order from the defendant railway's authorities, to the effect that No. 81 had been annulled between Flowery Branch and Armour's station. It is alleged that under defendant railway's rules a train which is twelve (12) hours late, loses, without any order at all, all its rights, and it is alleged that No. 81 was more than twelve hours late at all points north of Flowery Branch, and it is alleged that this order, in thus annulling its rights below or south of Flowery Branch, effectually took No. 81 off of the road, and made it a dead train, and allowed plaintiff's train to proceed on its own rights, and to proceed as a superior train to No. 81, and without any regard to No. 81.

6.

Upon receiving this order, plaintiff pulled out of Buford and proceeded with due care to run to Flowery Branch. When plaintiff got to Flowery Branch, and when he was about five rails away from the south switch at said point, plaintiff discovered (which is alleged to be the fact) that the switch was turned wrong, and from the main line, and so as to throw the train into the siding. Plaintiff immediately shut off his engine, and put his air into the emergency. It was all he could do, inasmuch as No. 81 was standing in the siding at this point, and to avoid being killed or mangled in the collision, and constrained by the emergency to do so, plaintiff, in the exercise of due care, jumped from the engine, and in doing so, was greatly and permanently injured.

7.

In a few seconds after plaintiff's jump, the engines did collide with a terrible crash upon said side track.

8.

It is alleged that the plaintiff was free from fault.

9.

It is shown that the defendant, Cox, was the conductor of No. 81, and had entire charge of said crew; the

defendant, Voils, was the engineer thereof, and the defendant, Ed Hurst, was the front brakeman or flagman on said No. 81, and each and all of said individual defendants represented the defendant railway company in the operation of the train, No. 81, and the placing of train No. 81 on the side track at said point, and in leaving open the switch at said point.

10.

It is shown to the Court that it was the duty of all of the defendants hereto, with reference to plaintiff and his said train, to have said switch turned so as to keep said train of plaintiff on the main line. It is alleged that the individual defendants hereto constituted the crew of said train, No. 81, and each and all of said defendants, representing the defendant Railway Co., participated in the turning wrong of said switch, and, after turning it wrong, negligently permitted it to stay turned away from the main line.

11.

It is shown to the Court that said switch was turned to said siding by said Hurst, the brakeman aforesaid, and No. 81 went into said siding and said Hurst negligently failed to turn said switch back to the main line, as was his duty. It is alleged that the negligence of said Hurst, and the negligence of the railway company, (the said Hurst representing the railway company in this regard) concurred in the negligent turning and failure to turn back of said switch. It is further alleged that the said Cox, who represented the railway company in the control and management of said train, was under the duty to see that said switch was turned from the main line, he being responsible for the proper turning of said switch, under the defendant railway's rules, customs and practices, and it is alleged that the said Cox negligently failed to look after said switch after No. 81 was in the siding and negligently failed to turn it back to the main line, as was his duty. In these

particulars the said Cox's negligence concurred with that of the defendant railway company.

12.

It is alleged that the negligence of the defendant, Voils, concurred with the negligence of the defendant railway company, in that said Voils, as engineer, after his engine got into the siding, in the exercise of ordinary care, knew and must have known (as it was visible to him) that the switch was turned wrong and to the main line, yet he failed to exercise ordinary care to report the same to the other members of the crew, or to take any steps to have it turned right, as was his duty. In these particulars his negligence concurred with the negligence of the defendant railway company.

13.

It is alleged that it was negligence in said three individual defendants to unlock, and cause to be unlocked, said switch and cause the same to be turned to the main line, and their negligence was the negligence of the defendant railway company, inasmuch as they represented the railway company in the operation of said train, No. 81, upon this occasion.

14.

It is alleged that it was negligent in the three individual defendants hereto not to discover that said switch was turned wrong, it being perfectly patent and visible that it was turned wrong, and in said failure to turn the same correctly to the main line, the said three individual defendants represented the defendant railway company, and their negligence concurred.

15.

It is alleged that said three individual defendants, representing the said railway company, owed to plaintiff the duty to have said switch turned to the main line, under the defendant railway's rules and regulations, and under the exercise of ordinary care, and their negligence concurred with that of the defendant railway company.

16.

It is further alleged that with said switch turned wrong, the individual defendants hereto, who were the members of the crew of No. 81, should have flagged the plaintiff's train, if for any reason the switch was to remain turned to the side track and it is alleged that notice was ——— given plaintiff that said switch was turned wrong until plaintiff got to a point on the track where he could see it, which was a few rail lengths away, and not in time to escape, and in this negligence the individual defendants represented the defendant railway company, and the negligence of all concurred.

17.

Plaintiff was permanently injured as follows: he was bruised, injured and mashed in and about his head, neck, shoulders, body, back, abdomen and limbs. His right leg, ankle and knee, the right shoulder, and the muscles of the right arm were all twisted, bruised and seriously injured. The bones in the right knee and ankle were permanently dislocated and displaced. The knee joint was stretched and ruptured and was much swollen and has never gotten well. The ligaments, nerves and muscles of the ankle were torn. The right shoulder was stretched and the muscles and nerves thereof torn and stretched, as likewise the muscles of the right arm. Plaintiff's capacity to labor and earn money has been totally destroyed. He will never be able to do railroad work again. The foot, ankle and leg are stiff and weak and he cannot walk without assistance. The right shoulder and arm were weakened, and he cannot exert it without pain. He has suffered and will continue to suffer great pain.. All time up to filing this petition has been lost. Doctors' and medical bills are Two Hundred (200.00) dollars per month. He was about thirty-five (35) years of age and had an expectancy in life of thirty-one years (31) during which time his capacity to labor and earn money has been destroyed. Plaintiff was earning from One Hundred

and fifty (150.00) to Two Hundred (200.00) dollars per month. For each and all the foregoing items of damage, plaintiff sues.

18.

Plaintiff alleges that the emergency upon him, when he jumped was great; that a collision was threatened and actually did occur; that in the exercise of ordinary care, it was necessary for him to jump to save his life or save great bodily injury, and that such emergency and threatened collision were brought about by defendant's negligence, it being further alleged that the crew of No. 81 had allowed the engine to stand too close to the track and it should have been further back in the siding.

Wherefore plaintiff prays process may issue, requiring defendants to be and appear at the next Term of this Court to answer plaintiff's complaint."

At the first Term of the City Court of Hall County, the Southern Railway Company filed its petition with proper bond to remove said case into the U. S. Circuit Court upon the ground that there was a severable controversy made by the case between W. M. Miller and the Southern Railway Co., with which the other defendants were not concerned; the presiding Judge refused the petition to remove; a copy of said petition for removal is as follows:

"To the City Court of Hall County, Ga.:

Your petitioner, the Southern Railway Company, one of the defendants in the above stated case, respectfully shows to this Honorable Court:

PAR. I.

That it is one of the defendants in the above stated suit which is of a civil nature now pending, and that said suit is brought to recover the sum of Twenty

Thousand ($20,000.00) dollars for personal injuries of plaintiff.

PAR. II.

Your petitioner further shows that said suit was begun in the City Court of Hall, in Hall county, Ga., by the filing of a petition for the issuance of process, said cause being returnable to the May Term, 1906, of said Court, and that the time required for answering or pleading to the declaration or complaint of the plaintiff, under the laws of Georgia, and the rules of said Court, has not arrived.

PAR. III.

Your petitioner further shows that controversies of a civil nature are set up in said petition of plaintiff, which are wholly between citizens of different States, to-wit: your petitioner, who was at the time of the commencement of said suit, and still is, a corporation incorporated under the laws of the State of Virginia, then and now a resident of the State of Virginia, and the plaintiff who was and still is a citizen of the State of Georgia.

PAR IV.

Your petitionor further shows that the controversies and causes set up against it and its co-defendants, Ed S. Hurst, Benjamin Voils and Tom Cox, are separable and distinct causes of action.

PAR. V.

Your petitioner further shows that plaintiff's petition, eliminating paragraphs 9, 10, 11, 12, 13, 14, 15 and 16, still make a distinct charge of negilence against your petitioner, alone sufficient in and of itself to give rise to the cause of actiou, and which, if proven, would entitle plaintiff to recover against this defendant without reference to any act charged against the co-defendants already mentioned, and for that reason there is a separable controversy and a separate and distinct cause of action between plaintiff and your petitioner that can be tried independant of the other defendants.

PAR. VI.

Your petitioner further shows that in addition to the reason above assigned why the controversies are separable, that this suit is against your petitioner and the said Ed S. Hurst, Benjamin Voils, and Tom Cox, as co-defendants, by reason of alleged personal injuries sustained by plaintiff, Wm. M. Miller, on the 17th day of June, 1904, at Flowery Branch, in said County of Hall.

PAR. VII.

The plaintiff, Wm. M. Miller, at the time of the occurrence of his alleged personal injury, was an engineer in the employ of your petitioner, and as such, in charge of one of petitioner's freight trains, known as train No. 72, which train ran into an open switch as plaintiff alleges, at Flowery Branch, and collided with train No. 81, standing on the siding, in consequence of which plaintiff was injured, and your petitioner is sought to be held liable for said alleged personal injury, upon grounds and causes of action separate and distinct from those upon which its co defendants are sought to be held liable.

It is alleged in plaintiff's complaint as negligence, as follows:

Par. 9. "It is shown that the defendant, Cox, was conductor of No. 81, and had entire charge of said crew; he defendant, Voils, was the engineer thereof, and the defendant, Ed Hurst, was the front brakeman or flagman, on said train, No. 81, and that each and all of said individual defendants represented the defendant railway company in the operation of train No. 81 and in the placing of train No. 81, on the side track at said point, and in the leaving open of said switch at said point.

Par. 10. "It is shown to the Court, that it was the duty of all the defendants hereto, with reference to plaintiff and his said train, to have said switch turned so as to keep plaintiff's train on the main line. It is alleged that the individual defendants hereto constituted

the crew of said train No. 81, and each and all of said individual defendants representing the defendant railway company participated in the turning wrong of said switch, and after turning it wrong negligently permitted it to stay turned away from the main track.

Par. 11. "It is shown to the Court that said switch was turned to said siding by said Hurst, the brakeman aforesaid, and No. 81 went into said siding, and said Hurst negligently failed to turn said switch back to the main line, as was his duty. It is alleged that the negligence of the said Hurst, and the negligence of the railway company (the said Hurst representing the railway company in this regard) concurred in the negligent turning and failing to turn back said switch. It is further alleged that the said Cox, who represented the railway company in the control and management of said train, was under the duty to see that said switch was turned from the main line, he being responsible for the proper turning of said switch, under the defendant railway's rules, customs and practices, and it is alleged that the said Cox negligently failed to turn it back to the main line, as was his duty. In these particulars the said Cox's negligence concurred with the negligence of the defendant railway company.

Par. 12. "It is alleged that the negligence of the defendant, Voils, concurred with the negligence of the defendant railway company, in that the said Voils, as engineer, after his engine got into the siding,—the exercise of ordinary care, knew and must have known, (as it was visible to him) that the switch was turned wrong, and to the main line, yet he failed to exercise ordinary care, to report the same to the other members of the crew, or to take any steps to have it turned right as was his duty. In these particulars, his negligence concurred with the negligence of the defendant railway company.

Par. 13. "It is alleged that it was negligence in said

three individual defendants to unlock and cause to be unlocked said switch and cause the same to be turned to the main line, and their negligence was the negligence of the defendant railway company, inasmuch as they represented the railway company in the operation of said train No. 81, upon this occasion.

Par. 14. "It is alleged that it was negligent in the individual defendants hereto, not to discover that said switch was turned wrong, it being perfectly patent and visible that it was turned wrong, and in said failure to turn the same correctly to the main line, the said three individual defendants represented the defendant railway company and their negligence was concurrent.

Par. 15. "It is alleged that said three individual defendants representing the said defendant railway, owed the plaintiff the duty to have said switch turned to the main line, under the defendant railway's rules and regulations, and under the exercise of ordinary care, and their negligence concurred with that of the defendant railway company.

Par. 16. "It is alleged, further, that with said switch turned wrong, the individuals hereto who were the members of the crew of No. 81, should have flagged the plaintiff's train, if, for any reason, the switch was to remain turned to the side track, and it is alleged that no notice was given plaintiff that said switch was turned wrong, until plaintiff got to a point on the track where he could see it, which was a few rail lengths away, and not in time to escape, and in this negligence the individual defendants represented the defendant railway company, and the negligence of all concurred."

PAR. VIII.

It is also sought to render this petitioner liable by reason of the alleged negligence of co-employees, and fellow servants of plaintiff, among them Ed S. Hurst, Benjamin Voils and Tom Cox, petitioner's co-defendants.

PAR IX.

Your petitioner shows that it is sought to be held liable by reason of the alleged negligence of co-employees and fellow servants of plaintiff, under and by virtue of a certain Statute of the State of Georgia, to-wit: Section 2323, of the Code of 1895, which reads as follows: "If the person injured is himself an employee of the company and the damage was caused by another employee and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."

PAR. X.

Your petitioner shows that it is sought to be held liable under said Statute law of the State of Georgia, which changes the common law rule of liability of the master for injuries caused to its servants by negligence of a fellow servant.

PAR. XI.

Your petitioner shows therefore that the controversies between plaintiff and this defendant are separable and distinct from those between plaintiff and Ed Hurst, Benjamin Voils, and Tom Cox, its co-defendants. Said Hurst, Voils and Cox are sought to be held liable for said acts of negligence as heretofore set out, under the principles of the common law, unchanged by the Constitution of this State or by Statute thereof. Whereas, petitioner is sought to be held liable in consequence of the Statute above quoted which is not applicable to the co-defendants.

PAR XII.

That, therefore, the grounds upon which said Hurst, Voils and Cox are sought to be held liable and the grounds upon which your petitioner is sought to be held liable, constitute separable and distinct controversies and separate and distinct causes of action.

PAR. XIII.

Your petitioner shows that, therefore, the controver-

sies between it and plaintiff being separable and distinct from those between plaintiff and the other mentioned co-defendants, that the same can be fully tried and determined between the two, plaintiff, and this, your petitioner.

PAR. XIV.

Your petitioner further shows that the controversies between your petitioner and plaintiff are monetary in character and the sum involved and in controversy therein, exclusive of interest and cost, exceeds the sum of Two Thousand ($2,000 00) dollars and is the sum of Twenty Thousand ($20,000.00) dollars.

PAR. XV.

That your petitioner desires to remove this suit before trial thereof, and to remove the same into the next United States Circuit Court, to be held in and for the Northern District of Georgia; and your petitioner hereby brings J. W. English, of the County of Fulton, and State of Georgia, as its surety for entering into the Circuit Court of the U. S. for the Northern District of the State of Georgia, on the first day of its next session, or before, a copy of the record in said suit, and for paying all costs that may be awarded by the said Circuit Court of the U. S. if said Court shall hold that this suit was wrongfully and improperly removed thereto; and also for its appearing and entering special bail in said suit if special bail was originally required, and for its complying in all respects, with the provisions of the laws of the United States, in the premises regulating the removal of cause from the State Courts.

PAR. XVI.

Your petitioner therefore prays that the said security and bond may be accepted; that this suit may be removed into the next Circuit Court of of the United States to be held in the Northern District of Georgia, pursuant to the Statutes of the United States in such cases made and provided and that no further proceedings may be

had therein in this Court, and your petitioner will ever pray, etc.

PAR. XVII.

Your petitioner further shows that its appearance through its attorney to remove this suit, is a special appearance and does not waive its objections to the jurisdiction of the Court, it being solely for the purpose of removal of said suit to the Circuit Court of the United States for the Northern District of Georgia."

The presiding Judge passed an order refusing to remove the case, but approving the bond. (See page 23 of Record.)

The Southern Railway then filed exceptions and carried the case to the Supreme Court of Georgia, but before it was heard the Court of Appeals of the State of Georgia was created, and the case transferred to that Court, in compliance with the Act creating same. By judgment of that Court rendered April 12, 1907, the judgment of the Court below was affirmed. The headnotes of that decision being as follows:

1. "A railway corporation can be jointly sued with three of its servants, when it is sought to make the corporation liable only by reason of the negligent acts of its said servants in the operation of a train under their management and control.

2. "Such action can be maintained by an employee, against the railway company and other employees jointly, when the injury was caused by the joint negligence of the employees within the scope of their employment.

3. "The right of removal to the Federal Court, under the Acts of Congress of March 3, 1887, and August 13, 1888, depends upon the state of the pleadings and the record at the time of the application for removal.

If, upon the face of the declaration, * * * the only pleading filed in the case, * * * the action is joint, for the purpose of determining the right of removal, the cause of action must be deemed to be joint. "A defendant has no right to say that an action shall be several which a plaintiff elects to make joint."

4. "Where a joint suit is brought by a resident of this State against a foreign corporation operating a railroad in this State, and against three of its employees who reside in this State, for an injury resulting from negligent acts, in the commission of which all the defendants participated, such suit is not removable by the corporation, as a separable controversy; and the refusal of the Judge to pass an order removing the case to the Circuit Court of the United States was not erroneous."

When the case was called in the City Court of Hall, on the return of the Remittitur from the Court of Appeals, the So. Ry. Co. filed a plea to the jurisdiction of that Court upon the ground that the case and cause of action having once been filed in the State Court, and removed into the United States Circuit Court, no other State Court had jurisdiction thereof, the copy of said pleas being as follows:

"W. M. Miller vs. Southern Railway Co. & Ed Hurst, Benjamin Voils, and Tom Cox.

SUIT FOR DAMAGES.

Now comes the Southern Railway Company, Ed. S. Hurst, Benjamin Voils and Tom Cox, the defendants in the above stated cause, and before pleading to the merits files this their plea in Bar, and for grounds thereof say:

PAR I.

That on the ——— day of———— —, 190—, the said plaintiff, Wm. M. Miller, filed in the Superior Court of

Hall and against defendant, the Southern Railway Company, a suit for the same cause of action, a copy of said petition being attached hereto.

PAR. II.

This defendant, the Southern Railway Company, filed in said court a petition to remove said case into the United States Circuit Court for the Northern District of Georgia, said petition being in regular form, with proper bond and security, and in every way complying with the statute, a copy of the same being attached.

PAR. III.

On the 17th day of July, 1905, being before the time at which defendant was required to plead said case, together with the cause of action, was under an Act of Congress regularly removed into the U. S. Circuit Court, for the Northern District of Georgia, the order transferring and removing said suit and cause of action being signed by the Honorable J. J. Kimsey, Judge, on the —— day of July, 1905. The Honorable J. J. Kimsey, Judge of said Superior Court, thus adjudging that the jurisdiction of the State court over said case and cause of action should then cease, and the case and cause be transferred to the Federal Court.

PAR. IV.

In pursuance to said order, a transcript of said case was filed in the Federal Court, above referred to, before the first of October, 1905, and on the —— day of September, 1905, the defendant, the Southern Railway Company, filed an answer to said case, thus pleading to the merits in said Federal Court, a certified copy of the entire proceeding being hereto attached. as part of this plea.

PAR. V.

On the —— day of March, 1906, after the defendant, the Southern Railway Company, had plead, the said Wm. M. Miller, plaintiff, dismissed his suit in the said Federal Court.

PAR. VI.

On the 12th day of March, 1906, the said Wm. M. Miller again filed the same suit, for the same cause of action, in the City Court of Hall, but added Ed. S. Hurst, Benjamin Voils and Tom Cox as co-defendants.

PAR. VII.

These defendants further show that the said Wm. M. Miller, before filing his suit the second time in the State court did not pay the cost that had accrued on the former suit, and for that reason was not entitled to recommence suit in any event.

PAR VIII.

These defendants allege that when the said case and cause of action was removed into the Federal Court as above stated, the effect was to give that court jurisdiction of both, and while plaintiff could dismiss and begin anew in that court, he could not dismiss and begin anew in the State court, even by adding co-defendants; that the City Court of Hall, in consequence of these facts has no jurisdiction of the case, and even if it did, the same could not be filed again until the cost had been paid.

WHEREFORE, they pray that this, their plea be sustained and said suit be dismissed and they have judgment for cost."

Attached was a certified copy of the former suit, the removal, and all the proceedings in the U. S. Court. (See page 26 of Record)

The plea was overruled in words as follows:

"Upon considering this plea it is adjudged that the same be overruled, the Court of Appeals having decided the questions therein made adversely to the plea in another case. This May 27, 1907.

J. C. Boone,
Judge C. C. H. C."

Upon the Judge of the City Court of Hall over-ruling

the plea, the defendants below filed exceptions *pendente lite*, as to the ruling in conformity with the Statutes of Georgia.

The defendants below then filed a Demurrer to the petition which was over-ruled, a copy of said Demurrer with the order thereon being as follows:

"HALL CITY COURT, MAY TERM, 1906.
No. 8-136.
W. M. MILLER
VS.
So. RY. CO. AND ED S. HURST, BENJ. VOILS, AND TOM COX.

SUIT FOR DAMAGES.

Now comes the Southern Railway Company, Ed. S. Hurst, Benjamin Voils, and Tom Cox, the defendants in the above stated case, on the first day of the first Term, and without waiving the plea in Bar, filed demur to said petition and says the same is not good in law for the following reasons:

1. The petition is not good as a joint action against all these defendants, for the reason that there is no joint act charged in the declaration participated in by all the defendants, either as an overt act, or in any other way.

2. It is not good as a joint action for the reason that the plaintiff's right of action as against the So. Ry. Co. is Statutory, authorizing him, if free from fault, to recover for the negligence of a fellow-servant; whereas his rights, if any, against the other defendants, is common law, and the two remedies cannot be combined in this way.

3. There is no act alleged against either of the defendants which amounts to an act of misfeasance The only acts charged against the defendants, other than the Southern Railway Company, being that of negligence as employees of said So. Ry. Co.

4. There is no allegation showing that these defendants, other than the So. Ry. Co. in the act of negligence charged, was guilty thereof, in consequence of any concert of action between them and the Southern Railway Company, or that their act of negligence was known to the So. Ry. Co. or directed by it or ratified by it.

5. There was no cause of action set out in the petition.

6. Defendants demur, especially to that part of paragraph 18, which alleges that the engine of train No. 81 had been left too close to the track, for the reason that he does not allege how close it was left.

WHEREFORE, the defendants pray that this, their Demurrer, be sustained and the suit dismissed.

JNO. J. STRICKLAND,
ED QUILLIAN,
Defendants' Attorneys.

On the 23d of May, 1907, the Honorable J. C. Boone, Judge, overruled said Demurrer, as follows:

"Upon considering this Demurrer, the same is overruled. This May 23, 1907.

J. C. BOONE,
Judge C. C. H. C.

To this ruling the defendants below excepted, in proper form. The case was then tried and resulted in a verdict for the plaintiff against all the defendants. A motion for a new trial was made and over-ruled, and the case carried to the Court of Appeals, with all the questions that had been made, and on the 15th of January, 1908, the Court of Appeals of Georgia, rendered a judgment affirming the Court below, on all the questions made, the head notes of the decision rendered by that Court being as follows:

"SO. RY. CO. ET AL, VS. MILLER.

1. As to all questions raised in the record, except those arising from the over-ruling of the motion for a new trial, the cases of the So. Ry. Co vs. Miller, 1 Ga. App. 616 (57 S. E. 1090) and So. Ry. Co. vs. Rowe, 2 Ga. App. 557, (59 S. E. 462), are controlling.

2. To be sufficiently specific to raise any question for determination, on review, grounds of a motion for a new trial complaining of the admission of testimony, should contain such recitals as will show with definiteness, independently of other portions of the record, the nature of the errors complained of.

3. Where a request to charge contains several distinct propositions, a ground of a motion for a new trial complaining that the Court refused the request in its entirety will be held not to be well taken, if any of the propositions are unsound.

4. No error appears in the instructions excepted to, nor in the refusal to continue the case.

5. It is the duty of the trial Judge to be reasonably satisfied that a verdict is just and true, before he approves it; but if, after deliberately weighing the matter, his mind and conscience does approve it, any slight dissatisfaction or doubt through which he may have passed, and to which he may have given expression in discussing the matter, preliminary to a decision, will not operate to relieve the verdict of that element of finality to which, when approved, it is entitled as a finding of fact."

To the several rulings of the Court of Appeals, the Plaintiff in error excepted, and thereupon assigned error as follows:

1. The Court erred in adjudging that under the Acts of Congress providing for the removal of a case from a State Court into the U. S. Circuit Court, that a case once removed could be dismissed in that Court and again sued in the State Court.

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2. The Court erred in holding that the State Court had jurisdiction to try the case after the same case had been removed into the United States Circuit Court, and in holding that, under the Acts of Congress, providing for such removal, the State Court could again take jurisdiction thereof, and in holding that the Plea to the jurisdiction should not have been sustained below.

3. The Court erred in holding that the petition on its face did not make a separable controversy, authorizing the Southern Railway Company to remove the case into the U. S. Circuit Court.

4. The Court erred under the Record in confirming the Judgment of the Court below in said case." (Pages 9 and 10 of the Record.)

QUESTIONS MADE AND HOW RAISED.

Two questions are therefore involved:

1. Whether or not the petition, as filed by Miller, in the City Court of Hall, on its face made a separable controversy, as between W. M. Miller, plaintiff below, and the defendant, the Southern Railway Company. This question was raised by a petition on the part of the Southern Railway Company, to remove the case into the United States Circuit Court.

2. Whether or not the City Court of Hall had jurisdiction to try the case after it had been filed in the Superior Court of Hall, and regularly removed into the U. S. Circuit Court, for the Northern District of Georgia, and there dismissed by Miller.

This question was raised by a plea to the jurisdiction.

SPECIFICATIONS OF ERROR RELIED UPON.

1. The Court erred in holding that the petition filed

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by Miller in the City Court of Hall, on its face did not make a separable controversy, authorizing the Southern Railway Company to remove the case into the U. S. Circuit Court.

2. The Court erred in holding that the City Court of Hall had jurisdiction to try a case after the same case been filed in Hall Superior Court, and regularly removed into the U. S. Circuit Court and there dismissed by plaintiff below.

BRIEF.

I.

FEDERAL QUESTION.

Whether or not a case is made in the State Court, for removal, is a Federal Question.

Gordon vs. Longest, 41 U. S. 97 (10 L. E. 900)
B. & O. Ry. Co. vs. Koontz, 104 U. S. 5, (26 L. E. 643.)
Goldey vs. Morning News, 156 U. S. 523. (39 L. E. 519).
B. C. R. & N. Ry. vs. Dunn, 122 U. S. 517, (30 L. E. 1159.)
Madisonville Traction Co., vs. Bernard Mining Co. 196 U. S. 245. (49 L. E. 465.)
Kansas City R. R. vs. Daugherty, 138 U. S. 298, (34 L. E. 963.)
Stone vs. S. C. 117 U. S. 430. (29 L. E. 962.)

Though a case go to the State Court of Review a second time, the question will be passed on when carried to the U. S. Supreme Court, if properly preserved.

Stanley vs. Schwally 162 U. S., 255, (40 L. E. 960.)
Re Blake, 175 U. S. 118, (44 L. E. 95.)

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Whether or not the State Court has jurisdiction to try a case once removed into the U. S. Circuit Court, and again sued in the State Court, is a Federal Question.

Kern vs. Huidekoper, 103 U. S. 485. (26 L. E. 354.)

National Steamship Co. vs. Tugman, 106 U. S. 118 (27 L. E. 87.)

The fact that the party, after removal, has contested the case in the State Court does not, after judgment against him, constitute a waiver as to jurisdiction.

Kern vs. Huidekoper, 103 U. S. 485, (26. L. E. 354.)

National Steamship Co., vs. Tugman, 106 U. S. 118. (27 L. E. 87.)

Goldey vs. Morning News, 156 U. S. 517. (39 L. E. 517.)

II.

The petition filed by Miller in the City Court of Hall, made a separable controversy on its face and was removable.

1. A joint action cannot be sustained against the master and the servant where the master is sought to be held liable solely for the acts of the servant without the concurrence of the master.

Warax vs. R. R. Co. 72 Federal 637.
Hakill vs. R. R. Co. 72 Federal, 745.
Beuttel vs. R. R. Co. 26 Federal, 50.
Ferguson vs. R. R. Co. 63 Federal 177.
Hartshorn vs. R. R. Co. 77 Federal 9.
Helms vs. N. P. Ry. 105 Federal, 449.
Ala. So. Ry. Co. vs Thompson, 200 U. S. 206.
Charman vs. Ry. Co. 105 Federal, 449.
Riser vs. Ry. Co. 116 Federal, 215.

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2. The acts of negligence charged in Miller's petition, against Hurst, Cox and Voils, the servants of the Southern Railway Company, and the Co-employees of Miller, were acts of Non Feasance, only, and for such acts the master only is liable to the injured party, the servants being in turn liable to the master.

Blackstone, Page 430.
1st Am. and English Ency. of Law, (Second Ed. Page 1131.)
20th Am. and Eng. Ency. of Law, (Second Ed. Page 52.)
Brice vs. Southern Ry Co. 125 Federal, 959.
Code of Georgia, 1895, Section 3029.
Kimbrough vs. Boswell, 119 Ga. 203.
Reid vs. Humber, 49 Ga. 208.
Code 3817.
Code 4940.
Code 3915.
McCalla vs. Shaw, 72 Ga. 458.
Hay vs. Collins, 118 Ga. 248.
Cox vs. Strickland, 120 Ga. 104.
Code of Georgia, Section 5872.
Burch vs. Caden Stone Co., 93 Federal, 181.
Shaffer vs. Union Brick Co., 128 Federal, 97.
Brice vs. So. Ry. Co. 125 Federal, 959.
Campbell vs. So. Ry. Co. 16 Am. Report, 512.
Cent. of Ga. Ry. Co. vs. Brown, 113 Ga. 414.
Code of Georgia, 2321.
Pomroy on Code Remedies, Sec. 307.
Cromwell vs. County of Sac, 944 U. S. 352, (24 L. E. 195.)
So. Ry. Co. vs. Grizzle, 124 Ga. 735.

3. The Suit of Miller against the Southern Railway Company, was based upon a Statutory cause of action and the suit against the defendants, Hurst, Voils and

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Cox, was based upon a common law right, if any right. The two separate causes of action were blended in one count and thus made a separable controversy.

Helms vs. N. P. Ry. 120 Federal, 389.
Lavallee vs. Ry. Co. 40 Minn. 249.
Johnson vs. R. R. Co. 43 Minn 222 (8 L. R. A. 419.)
Beuttel vs. R. R. Co. 26 Federal, 50.
Ala. So. Ry. Co. vs. Thompson, 200 U. S. 206.
Gustafson vs. Ry. Co. 128 Federal, 85.
Atlantic Coast Line Ry. Co. vs. Bailey, 151 Federal 891.
R. R. Co. vs. Stepp, 151 Federal, 909.
N. E. R. R. Co. vs. Conroy, 175 U S. 323.
James vs. Kelley, 107 Ga. 452.
R. R. Co. vs. Dixon, 79 U. S. 131.
West. & At. R. R. Co. vs. Exposition Cotton Mills, 83 Ga. 441.
Charleston & W. C. Ry. Co. vs. Miller, 113 Ga.
Cavanaugh vs. So. Ry. Co. 120 Ga. 67.
McDormant vs. ——— 87 Mo. 286.
Addecker vs. Schrubbee 45 Iowa 315.

4. Eliminating from the petition filed by Miller, all the paragraphs that refer to Hurst, Cox and Voils, the petition still made on its face a case authorizing a recovery against the Southern Railway Co. and the same was therefore removable.

III.

When the case was sued in Hall Superior Court, and removed into the U. S. Circuit Court, the cause of action as well as the case was removed and Miller could not, by any act of his again bestow jurisdiction upon the State Court.

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Kern vs. Huidekoper 103 U. S. 485. (26 L. E. 354.)
Natl. Steamship Co. vs. Tugman 106 U. S. 118. (27 L. E. 87.)
Gordon vs. Longest 41 U. S. 97. (10 L. E. 900.)
Goldey vs. Morning News, 156 U. S. 523. (39 L. E. 519.)
McIver vs. F. C. & P. R. R. 110 Ga. 223.
Webb vs. Sou. Cotton Oil Co. 131 Ga. 682.

ARGUMENT.

I.

That a Federal Question was made, both in the petition to remove as well as the plea to the jurisdiction, will hardly be disputed. It was stated by this Court in the case of the B. C. R. & N. Ry. Co. vs. Dunn, 122 U. S. 517, that "all issues of fact made upon the petition for removal must be tried in the Circuit Court, but the State Court is at liberty to determine for itelf whether, on the face of the Record the removal has been effected, and if it decides against the removal its action will be reviewable in this Court after final judgment." In the case of B. & O. R. R. vs. Koontz, 104 U. S. page 5, this Court in the 6th head-note uses this language: "Whether the case is made for removal is a Federal Question. If, after a case is made, the State Court forces the petitioning party to trial, and judgment and the highest Court of the State sustains the judgment, he is entitled to his writ of error to this Court if he saves the question on the record." The case of Gordon against Longest 41 U. S. Page 97, was a case very much like the one at Bar, in so far as the preservation of the questions is concerned, and this Court held that the petition to remove made a Federal question.

It is equally as well established that the plea to the

jurisdiction of a State Court, upon the ground that the cause of action has been removed into a Federal Court, makes a Federal Question.

II.

The next question to be considered is whether or not the pleading on its face made a separable controversy authorizing the removal, and whether or not the effect of the petition and bond was to terminate the jurisdiction of the State Court and confer jurisdiction on the Federal Court. If this is true the judgment "rendered in this case is a nullity and should have been set aside on motion for new trial.

Plaintiff Miller sued the Railroad Company, a Virginia corporation, and joined in his action three of his co-employees, a conductor, an engineer and a brakeman, all three being residents of the State of Georgia where Miller has his citizenship.

According to the contention of the Southern Railway Company, the action against it is based entirely upon its responsibility for the acts of negligence of its co-defendants. The railway company insists that it did not become liable, and the action is not brought against it by reason of direct participation in the acts of negligence charged, but on the contrary, that instead of participating in the negligence, as shown by the petition, the injury was the result of the acts of Hurst, Cox, and Voils, contrary to the rules and regulations which the Railway Company had made in the management of its lines upon which plaintiff was employed. The facts

stated in plaintiff's petition justify this contention of the Railway Company. See the allegations in paragraph 11 as to rules, regulations, customs, and practices established by the Railway Company, Page 15, of Record. See also the allegations of fact in the 15th paragraph of the plaintiff's petition, and it will appear that the only allegations of fact as to the negligence charged relate to the individual acts of Hurst, Cox and Voils, and that it is not shown in the petition by any allegation of fact that the Railway Company participated in the negligence which caused plaintiff's injury and for which he sues.

The conclusion is, therefore, irresistible that the Southern Railway Company is sought to be held liable or can be held liable in this action solely upon the ground that it employed Hurst, Cox and Voils, and that they committed acts of negligence in connection with such employment and, in so doing, the business of the Southern Railway Company by which Miller was injured. If held liable at all, it will be upon the principle of law that the principal is responsible for the acts of the agent while engaged in the business of the principal, from motives of public policy, even though the principal may be absent or, as it is tersely put, upon the principle of *respondeat superior*.

It is also equally manifest that Hurst, Cox and Voils, if held liable, will be so held on account of their individual and personal acts of misfeasance.

A further study of plaintiff's petition and of the relations of the several parties to each other and to the ac-

tion, also discloses that plaintiff Miller, at the time of his injury, was fellow-servant of defendant Hurst, Cox, and Voils. We therefore have Hurst, Cox, and Voils liable at common law. Not so with the Southern Railway Company, but, according to the petition, it is sought to be held responsible under the Statute of Georgia, which makes a railroad corporation liable for injuries to an employee growing out of acts of negligence of co-employees or fellow-servants. The Statute of Ga. on the subject is found in Section 2223 of the Code of 1895 and is as follows:

"If the person injured is himself an employee of the Company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."

The Southern Railway's contention that the petition of plaintiff makes upon its face a separable controversy from that set up against its co-employees can be based upon these concrete grounds: First, the action against it, being based upon the principle of *respondeat superior* and not for any participation on its part in the negligence causing the injury, is distinct from the action brought against Hurst, Cox, and Voils, against whom a case is made for negligence growing out of personal acts of nonfeasance. Second. The acts of negligence charged against Hurst, Cox, and Voils, are acts of nonfeasance only, for which they are not liable to the injured party, because the action set up by plaintiff in his petition against Hurst, Cox, and Voils is under the common law,

and that set up against the Southern Railway Company is statutory, being based upon the Statute of Ga. above referred to. If Southern Railway Company is correct in all or either of these positions the cause was removable.

1. As supporting the doctrine that a joint action cannot be sustained against the master and the servant where the master is sought to be held liable solely for the acts of the servant, without the concurrence of the master, can be cited the cases of:

Warax vs. Railroad Co., 72 Federal 637;
Hakill vs. Railroad Co., 72 Federal 745;
Beuttel vs. Railroad Co., 26 Federal 50;
Ferguson vs. Railroad Co., 63 Federal 177;
Hartshorn vs. Railroad Co., 77 Federal 9.

The particular attention of the Court is invited to the case of Helms vs. Northern Pacific Railway Co., 120 Federal Reporter, pages 394-397 inclusive, for the very clear analysis of cases and reasoning by which the Court reaches the conclusion that no joint cause of action exists against a master and a servant where the master is sought to be held responsible solely for the acts of the servant in which acts he did not concur.

The case of Warax vs. Railway Company, 72 Federal 642, a decision rendered by Judge Taft, has been much cited and is alluded to in the case of Alabama Southern Railway vs. Thompson, 200 U. S. 206, upon which case movant here mainly relies. But it is respectfully submitted that the Warax case has not been disapproved by the Supreme Court of the United States to the extent

of impairing it as authority. The Helms case, it is respectfully submitted, renders utterly untenable the reasoning of the Circuit Court in the cases of Charman vs. Railroad Company, 105 Federal 449, and Riser vs. Railway Company, 116 Federal 215, which are in opposition to the view we are urging. We leave this phase of the question as one mooted in the courts, upon which there is a division of opinion, the better reasoning, we respectfully contend, sustaining the view that where the master is sought to be held responsible solely upon the ground of respondeat superior with the servant in whose acts he did not participate, no joint cause of action arises, though in fairness it should be stated that the case of Ala. Sou. vs. Thompson, 200 U. S., tends to the contrary.

2. It will be observed by an inspection of the declaration of Miller, that there is no charge of malfeasance or misfeasance against Hurst, Voils and Cox, the Co-Defendants below, and the fellow-servants of Miller, but merely nonfeasance.

Does that render Hurst, Cox and Voils liable to a third person injured in consequence of such negligence?

Under the common law a servant, or agent, was not liable to third persons for a negligent discharge of his master's duties towards them, unless such negligence was wilful and malicious.

In First Blackstone, page 430, the rule is laid down as follows:

"If a servant, by his negligence does any damage to

a stranger, the master shall answer for his neglect: if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant."

The reason for the rule assigned is that between the stranger and the servant there was no contract expressed or implied, to perform the work skilfully, but between the master and him there was. Between the servant of a railroad and a stranger there is no contract expressed or implied to discharge the duties of the railroad skilfully, but between the railroad and the stranger, as well as between the Railroad and the State there is a contract and duty fixed by law that the work performed by such railroad shall be skilfully performed, so as not to injure such third person.

In the first Am.-Eng. Enc. of Law, Second Edition, page 1131, in discussing torts, the rule is laid down as follows:

"In determining the liability of an agent to third persons for damage resulting from his conduct as agent, a distinction is usually drawn between those cases in which the injury complained of is the result of mere nonfeasance or omission of duty on the part of the agent in the course of his employment, where such default does not amount to misfeasance, and those in which the injury arises from some act of misfeasance or positive wrong on his part.

With reference to the former class of cases, the established doctrine is that the agent's liability is solely to his principal, there being no privity between him and third persons, but only between him and his principal. Hence, as to all such negligences and omissions of duty, the agent is not liable to third persons, but the general maxim *respondeat superior* applies."

In the 20th volume Am. Enc. of Law, Second Ed., p. 52, the rule is stated thus:

"The servant is not, in general, liable to third persons for his nonfeasance in the course of his employment. If he neglects to perform a duty which the master owes to third persons, the remedy is against the master and not against the servant. The servant's liability under these circumstances is solely to his master, there being no privity between him and such third persons. Where, however, the servant is guilty of actual misfeasance or tort, resulting in injury to a third person, the servant as well as the master will be liable.

In the case of Brice against the So. Ry. Co., reported in the 125 Federal Reporter, p. 959, which arose in South Carolina, the rule is stated thus:

"Servants of a railroad company in charge of a train on which a passenger was injured are not personally liable to such passengers for the injuries sustained, unless the injury resulted from the misfeasance and positive wrong of such servants."

And on page 962 of the same case, the doctrine as laid down by Judge Story, in his work on Agency, is approved, being quoted as follows:

"The agent is also liable to third persons for his own misfeasances and positive wrongs. But he is not liable to third persons for his own nonfeasances or omission of duty in the course of his employment. His liability in these latter cases is solely to his principal. Hence the general maxim is to all such negligence and omissions of duty in the case of private agency, *respondeat superior*."

It will be observed that the petition alleges nothing against Hurst, Cox and Voils, except the omission of an act which they ought to have performed. Nonfeasance is defined to be the omission of an act which a person

ought to do. The omission alleged being that they should have seen the switch was closed.

It will thus be observed that the Encyclopedia and the authorities upon which the text is based goes beyond what was the common law. Under Blackstone's statement an agent was in no instance liable to a third person for negligence in the dsicharge of his principal's business. The modern doctrine as evolved by the various Courts under the Statutes of the various States, is that the Agent is not liable for his acts of omission, but is liable for his acts of positive wrong, even though they were committed in the discharge of his master's business. Which of these rules prevails in Georgia? It is undoubtedly true that the common law is of force, except as modified by statute.

Section 3029 of the Code of Ga. provides:

"The principal is bound for the care, diligence and fidelity of his agent in his business, and hence he is bound for the neglect and fraud of his agent in the transaction of such business."

This is a mere statement of common law as to agents proper.

Section 3041 provides:

"All agents, by an express undertaking to that effect, may render themselves individually liable, and every agent exceeding the scope of his authority is individually liable to the person with whom he deals; so, also for his own tortous act, whether acting by command of his principal or not, he is responsible; for the negligence of his underservant, employed by him in behalf of his principal, he is not responsible."

The first part of this section recognizes the common law rule and provides that it may be modified by contract. The second part of it makes him liable for his torts which was the commen law. The Supreme Court of Ga. in the case of Kimbrough vs. Boswell, in the 119 Ga., p. 203, Justice Lamar delivering the opinion says:

"While an agent is personally liable to those injured by his misfeasance, he is not ordinarily liable for mere nonfeasance." And he cites as authority Code 3029 and 3041, and the case of Reid vs. Humber 49 Ga., p. 208.

Code 3817 says:

"Every person shall be liable for torts committed by his wife, and for torts committed by his child, or servant by his command, or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary," is practically a statement of the common law on the subject. There is no suggestion that such persons should be jointly liable for torts committed by the servants.

That the principal or master, and not the agent or servant is liable when the act is committed by such an agent or servant for the master is recognized in Code Section 4940, which reads as follows:

"An action for a tort must, in general, he brought in the name of the person whose legal right has been affected, and who was legally interested in the property at the the time the injury thereto was committed, and against the party committing the injury, either by himself, his servant or agent in his employment."

Had the Codifiers intended to change the common law on the subject they would have added to that section the

words: "either jointly or severally." The failure of the codifiers to so express the statute is clearly indicative of the Legislative mind.

Section 3915 of the Code provides:

"Where several trespassers are sued jointly, the plaintiff may recover, against all, damages for the greatest injury done by either. But the jury may, in their verdict, specify the particular damages to be recovered of each, and judgment in such case must be entered severally."

But this has reference only to trespass on property, and not to personal torts, as was decided in the case of McCalla, 72 Ga. 458, and followed in the case of Hay against Collins, 118 Ga. 248. While this Court in the case of Cox, 120 Ga. 104, held the word "trespass" as used in the Constitution, Code 5872 included all kinds of tort in so far as giving to a Court jurisdiction of a joint tort feasor living in another County was concerned; it also recognized in the same case the limitation of Code 3915 as above stated.

The Legislative mind on this subject may be gathered from a radical change that was made when our first code was adopted Prior to that time the statute provided that if a freight train was run on the Sabbath, the engineer might be indicted. The Code changed the law and provided that where a freight train was run on the Sabbath, the Superintendent of Transportation should be indicted, and this Court has held that the engineer, though guilty jointly with the Superintendent, in that the act was a misdemeanor and both participated, yet

the engineer cannot be indicted. The purpose of the Legislature in adopting the Code, as well as the Codifiers in making it, was to place the responsibility for the operation of trains by railroad companies upon the Company, or the officers thereof, and to relieve the employees. It was no more contemplated that an employee should be sued for the conduct of his master performed through such employee, than it was that he should be prosecuted for the conduct of his master performed through him.

If the allegations in plaintiff's petition make Hurst, Cox, and Voils liable under the law for their conduct, do they make them jointly liable with the Railroad Company? In the case of Burch, reported in the 93d Federal Reporter, 181, same being a Kentucky case, the head note is as follows:

"An employee of a corporation cannot be held jointly liable with the corporation for an injury to another employee alleged to have resulted from negligence, both on his part and on the part of the corporation, where it is not alleged that he was guilty of *wilful* wrong doing, or that he acted *outside* of his instructions or the *scope* of his employment."

And on page 182, the Judge, delivering the opinion, says:

"Mere negligence, however gross, would not change the rule, unless it were wilful or malicious."

In the case of Shaffer, in the 128 Federal Reporter, 97, it is stated as follows:

"To constitute a joint liability of master and servant for the negligence of the servant, there must be actual

negligence, as contradistinguished from imputed negligence, of the *master* concurring with an act negligently committed by the servant."

This is undoubtedly the true rule, as clearly proven by the Judge writing the opinion in this case. It is hard to conceive of a master being jointly liable with his servant for an act of the servant committed in his absence.

In the case of Warax, 72 Federal Reporter 647, it is stated as follows:

"A suit against a principal and the agent, for the mere negligence of the agent, in the absence of the principal, is a misjoinder, and that the causes of action are not joint, but several."

In the case of Bryce against the So. Ry. Co., reported in the 125 Federal Reporter 959, the head note is as follows:

"Servants of a railroad company in charge of a train on which a passenger was injured are not personally liable to such passenger for the injuries sustained unless the injury resulted from the misfeasance and positive wrongs of such servants."

The Judge in delivering the opinion of the Supreme Court of Maine, in the case of Campbell, reported in the 16th Am. Reports 512, after deciding in that case that both the principal and agent were liable, uses this language.

"But it does not thence follow that they are jointly responsible. The question whether they may be so held is a somewhat nice one, but we think there are substantial reasons assigned in Parsons vs. Winchell, 5 Cush, 592, why the principal and agent should not be charged jointly in such a case. It is not, properly speaking,

their joint act or neglect which causes the injury.

The proper adjustment of the final responsibility as between themselves cannot be effected, if one who has distinct grounds of action against them—against the agents for their own negligence—against the principals because the law makes them responsible for the negligence of their servants—is permitted to recover against both in one suit. The distinction between actions on the case arising from negligence, and actions of trespass, where the wrong is inflicted at the command of the superior, in this respect is well marked, and goes somewhat deeper than mere form."

This Court, in the case of Central of Ga. Ry. Co. vs. Brown, 113 Ga. 414, while it sustains the joint action distinctly recognizes this doctrine.

Chief Justice Simmons, delivering the opinion, page 419, says:

"These authorities show that a master and servant may be jointly sued in trespass for a wilful and affirmative wrong committed by the servant within the scope of his employment. This is upon the theory that in trespass all are principals and the act of one the act of all."

The facts of the case being then decided make it a case of trespass pure and simple, and while the Chief Justice holds the suit well founded against both defendants, he places it on the well recognized ground that they were joint trespassers. I think this conclusion, however, is not in line with the weight of authority on the subject, as will appear from the various cases above cited and the references therein.

While a railroad, as a master, may properly be held liable for a tort committed by the servant, it is difficult

to conceive how such railroad could be a joint trespasser with an employee. If the Railroad Company acted at all it was by its agent. The agent would therefore occupy an anomalous position, while committing the trespass in acting for his principal and himself at the same time. He would be both principal and agent at the same time; principal as to his own conduct and agent as to his own conduct. This is an unusual position, and one not tolerated by the law in principal and agent, other than railroads; why should it be tolerated when applied to a railroad?

The Statute of Georgia formed as to the liability of railroads never contemplated that the employees should be subject to suit jointly with the employer.

Code Section 2321, provides:

"A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

The presumption is against the Company not the servant. If they can be sued jointly their liability is to be determined by different evidence and under different rules of law. To constitute a joint liability of a master and servant, or principal and agent several conditions should exist; to-wit, it should be alleged that each took part in the act constituting the tort; that the servant

took part in it not as servant but aside from the duties he was discharging for his master, or that the master took part in it by some act discharged jointly with the servant. Again, the evidence to make out the case should be introduced under the same general rule of law. If the master and servant under our Statute can be sued jointly, the rules of law laid down in the Code applicable to one would not be to the other. The plaintiff could make his case by showing damage from the running of the locomotive or the machinery of the defendant railroad. The law would presume the rest. As against the employee the burden would be a different one.

Pomroy in his work on Code Remedies, at section 307, speaking of the right to proceed against the defendants jointly for an injury resulting from negligence says:

"In order, however, that the joint rule thus stated should apply and a union of wrong doers in one action should be possible there must be some community in the wrong doing among parties who are to be united as defendants. The injury must in some sense be their joint work; it is not enough that the injured party has on certain grounds a cause of action against one for the physical tort done to himself or his property, and has on entirely different grounds a cause of action against another for the same physical tort; there must be something more than the existence of two separate causes of action for the same act or default to enable him to join the two parties liable in the single action. This principle is of universal application."

If a recovery can be had in an action against a railroad company and its engineer jointly for the nonfeasance of the engineer in running the train, or indeed for

any character of negligence on his part in running it, a judgment therein would conclude both defendants that it was a joint act of misfeasance on their part, both defendants being parties to the judgment and a general verdict on such petition would conclude both defendrnts as to every fact included within the allegations of the petition.

Cromwell 94 U. S., p. 352.
(24 L. E. 195.)

This being true, the doctrine that where a master is held to respond for the wrongful act of the servant, done without the master's participation or direction, he may recover against the servant for full restitution comes to naught.

We urge the other view, that the suit against the two individuals being at common law, and against the Railway Company being statutory, a separable controversy is necessarily presented, with the greatest confidence. As supporting this view also, we cite the case of Helms vs. Northern Pacific Railway Company, 120 Federal 389. We quote *certa* in portions of the opinion of the court on pages 397 and 398:

"There is, however, in the present case, a peculiar reason for treating the causes of action as separate. The deceased was the fellow-servant of the engineer and the other persons in charge of the engine whose negligence caused this injury. At common law, therefore, the corporation would not be liable. As against it, the plaintiff must rest her cause upon the Statute of Minnesota, doing away with the so-called 'fellow servant rule' as to railroad companies in certain cases. This

Statute is identical with that of Iowa, which Judge Shiras had under consideration in the case of Beuttel vs. Railroad Co. (C.C.) 26 Fed. 50, and what he there says is direct in point in passing upon the present case. To sustain her action against the railway company, the plaintiff must prove at least three things, which would be wholly immaterial as to the other defendant. She must show (1) that Ames and the other employees guilty of negligence were employees of the defendant railway company: 2 that they were engaged in operating the railroad; and (3) that the particular thing they were doing involved some risk peculiar to the operation of railroads.

Lavallee vs. Railway Co. 40 Minn. 249; 41 N. W. 974.

Johnson vs. Railroad Co., 43 Minn. 222; 45 N. W. 146; 8 L. R. A. 419.

These features separate the cause of action as against the master more widely from that against the servant than would be the case in a suit by a third party to charge the master on his common law liability for the negligence of his employee. Such a suit would rest, as against both the defendants, upon the common law; whereas the present suit is founded as against the master upon Staute, but as against the servant upon common law."

The decision of Judge Shiras in the case of Beuttel vs. Railroad Co. et al., 26 Federal Reporter 50 is also strong and convincing. The difference in an action by an employee of a railroad against the master and the fellow-servant and the separableness of the controversies against the two is forcibly illustrated by the court, showing how different the proof necessary to sustain an action against the railroad on the one hand, and against the employee on the other would be. We quote from page 53.

"In the cause now before the court, as against the defendant Emsley, the case on part of plaintiff would be made out by proof that said Emsley, having charge and control of the train, negligently ran the same over the deceased, thereby causing his death. As against the Company, it would be necessary to show that the train upon its road, while under the control of the employees of defendant, negligently and carelessly run over the deceased, causing his death; and that the company had been guilty of negligence in the selection of incompetent employees, or in failure to furnish proper appliances for the management of its trains; or that the deceased came within the provision of the Statute of Iowa making railway companies liable to a certain class of employees for injuries caused by the negligence of co-employees.

"In the case of the engineer, he is charged with liability by reason of his own personal negligence, resulting in injury to another. In the case of the company, it is charged with liability by reason of its relation of master or employer. If the deceased does not come within the protection of the Iowa Statute, then the fact that Emsley was negligent would not alone fasten liability therefor upon the company. If the liability upon the part of the company arises by reason of the Statute of Iowa, then the liability of the company, and of the engineer, are not based upon the same legal grounds, nor will the same evidence sustain a recovery against both."

It is respectfully urged that the case of the Alabama Southern Railway Company vs. Thompson, 200 U. S. 206, is not authority for the proposition that a joint cause of action is made against a railroad company and its servants, where the servants are sought to be held responsible under a common law liability and the railroad under a statutory liability. The Thompson case

merely holds that the action there presented was joint, and that for purposes of removal the pleading made by the plaintiff in the State court must be looked to for the determination of whether or not a separable controversy is presented. The following language in the opinion on pages 219 and 220 clearly shows that the question we are urging was not in the Thompson case:

"The federal courts in some States hold a different rule as to the doctrine of fellow-servant from that administered in the State courts, and in other ways administer the common law according to their views. It has not been suggested that a right of removal should arise from such differences."

This extract must mean that the differences that we are urging here as to the character of the liability sought against the fellow servants and that sought against the Railway Company was not urged in the Thompson case, and to show, conclusively that the question as to the difference between causes of action arising at common law and under a statute was not considered by the court in the Thompson case. We quote the final utterance of the Court in its opinion:

"In this case we have taken no account of the peculiar Statute of Tennessee as to the liability of railroads for injuries to persons on the tracks, as its effect is not presented in the questions propounded, nor is it stated that the injury was received in the State of Tennessee."

In other words, the Thompson decision is based entirely upon the question certified in the Supreme Court of the United States by the Court of Appeals of the sixth circuit. And the question as to whether a plead-

ing which proceeds against two defendants upon a common law liability and one defendant upon a statutory liability presents a separable controversy, entitling the defendant proceeded against upon a statutory liability to remove the case. The other grounds for removal existing, was not certified in the Thompson case and was not passed upon. The companion case of Railway Company vs. Bohon, 200 U. S. 221, is not authority against our contention as the suit in the latter case was based upon a Statute from Kentucky creating a joint statutory right against the railroad and its servants. The court in the opinion, Bohon case, page 226, clearly bases its decision upon the Statute of Kentucky giving the right as is shown by the following language:

"A State has an unquestionable right by its constitution and laws to regulate action for negligence, and where it has provided that the plaintiff in such cases may proceed jointly or severally against those liable for the injury, and the plaintiff in due course of law and in good faith has filed a petition electing to sue for a joint recovery given by the laws of the State, we know of nothing in the Federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a non-resident defendant therein properly joined in the action under the constitution and laws of the State wherein it is conducting its operations, and is duly served with process."

So far as the federal authorities are concerned, therefore, we can confidently urge that their weight is in favor of the proposition we are seeking to maintain. We cite the case of Gustafson vs. Railway Company et al., 128 Federal Reporter 85.

The latest federal cases on the subject are entirely consonant with the view we take and strongly sustain the same. The case of Atlantic Coast Line Railroad Company vs. Bailey, volume 151, Federal Reporter, page 891, is a decision by Judge Speer. The proposition is succintly and plainly stated in the opinion on page 895, as follows:

"Here M. R. R. Bailey and J. F. Bailey were co-employees. Under these pleadings the right of the plaintiff to recover in tort against the latter, if any right exists, is based upon the common law. The right to recover from the company is entirely distinct, and rests solely upon the Statute. At common law the master was not liable to a servant for injuries committed by a fellow servant; but the Georgia Statute has modified the rigor of that rule in the case of railroad corporations."

Attention is also invited to the case of Railway Company vs. Stepp et al., 151 Federal, page 909, which is a decision by the Circuit Court of the Western Division of Missouri. In the last case, it seems to have been conceded that if the Statute of Missouri did not give a joint action against plaintiff's fellow servant as well as the railroad, removal could not be prevented. It was held that the Statute did not give an action against the engineer and the removal was allowed. The Court on page 914 says:

"It was scarcely necessary to add that where the petition on its face, as in this case, and the petition for removal show that the actual relation of the local defendant was that of a mere engineer in the employ of the Railroad Company, against whom no recovery can

be had under the Statute on which the action is predicated, the mere subsequent allegations in the petition that the defendants negligently did so and so is ineffective to prevent the railroad company, a non-resident corporation, from removing the case into this jurisdiction."

There were many allegations in plaintiff's petition that Hurst, Cox and Voils were the representatives of the railway company. It is difficult to understand just what is meant by this. There can be no doubt, however, despite these allegations, that Hurst, Cox and Voils were fellow servants of Miller and that therefore the Railway Company would not have been liable for the injury at common law, and that liability was only imposed upon it by the provision of the Statute which has been stated. It certainly would not be contended that the engineer was a vice-principal relative to Miller, and it cannot now be contended that either of them was, in view of the decision of the Supreme Court of the United States in the case of New England Railroad Company vs. Conroy, 175 U. S. 323.

Nor can it be contended that the provision of the Ga. Statute changes the rule at common law, making railroads responsible to employees for injuries resulting from the negligent acts of fellow servants, including Hurst, Cox and Voils, so as to create a joint action against them and the Railway Company.

This provision of the Statute changes the common law and, therefore, must be strictly construed. Its language, as well as the purpose of its enactment, clearly

shows that the right therein conferred is against the railroads solely, and not against their servants who were liable for their acts at common law. That this view is correct, a reading of the opinion in Railway Company vs. Stepp, 151 Federal Reporter, page 908, heretofore quoted, will make sure.

There are many allegations in plaintiff's petition that the acts of negligence on the part of the Railway Company concurred with those of Hurst, Cox and Voils. No facts, however, are alleged which show this. As heretofore shown, the facts found in the petition negative any such idea. It is a well settled principle of law that in the construction of a pleading, the facts stated, and not the conclusion of the pleader, are to be looked to in determining its legal effect. James et. al., vs. Kelley, et. al., 107 Ga, page 452;

"The rule is, that the pleadings must state facts and not legal conclusions."

As said by Judge Shiras in Beuttel vs. Railway Company, 26 Federal Reporter 52:

"The rule deducible from these authorities is that, in all actions, whether in tort or upon contract, wherein the liability of the defendants in joint, or joint or several, the plaintiff may, by declaring against all jointly, present in his petition only one cause of action, and, in such case, the defendants cannot, by tendering separate issues in their answers, claim that thereby separable controversies are involved, so as to entitle one or more of the defendants to remove the cause under the second clause of section 2 of the Act of 1875. The right of removal turns upon the question whether the plaintiff, by the averments of fact in his petition, shows that he

bases his action upon a cause which is joint, or may be made so, at the option of plaintiff, against all defendants, and that plaintiff has, in the latter case, elected to declare against all the defendants jointly. If the averments of the petition show that the cause of action is joint, or being joint and several, has been declared on as joint by the plaintiff, then the cause is not removable unless all the defendants are citizens of a State other than that of which plaintiff is a resident. If, however, the facts averred in the petition show that the plaintiff has united therein more than one cause of action, and that the same can be so separated as to present a controversy between citizens of different States which can be fully determined without the presence of the other parties to the suit, then the cause may be removed."

The test of whether a suit presents separable controversy certainly cannot be the conclusion of the pleader, but the averment of facts must be looked to as determining the question. As said in Helms vs. Northern Pacific Railway Company, 120 Federal Reporter 390.

"But even if it were stated in general terms that the injury was caused by the general negligence of both defendants, this ought not to be conclusive upon them. On the contrary, the plaintiff should at least be required to make his pleading definite and certain by a statement of the facts upon which the charge of joint negligence is based."

We invite attention to the allegation of fact in the present case, and these separated from the conclusions of the pleader demonstrate that no joint negligence is charged in this action.

We desire also to quote from the case of Gustafson

vs. Railway Company, 128 Federal Reporter 88, as follows:

"But the right and duty of the court are well recognized to examine the petition by its 'four corners' to see if a joint cause of action is stated; for no matter how designedly and repetitiously the pleader may assert that the defendants did so and so, such asseverations will be treated as a mere brutum fulmen, if, taking the facts as a whole stated in the petition, they disclose, in contemplation of law, a separable cause of action against the defendants. As held by the Supreme Court of this State, the allegation of negligence on the part of the defendant in general terms is treated as mere surplusage—words without meaning—when preceded or followed by specific allegation of specific acts of negligence."

And as said by Judge Speer in Atlantic Coast Line Railroad Company vs. Bailey, before quoted, on page 894:

"Negligence or liability is not necessarily joint merely because the pleader so charges it in terms. The deduction of joint negligence must be based upon specific facts in the petition which justify it."

There is no fact in plaintiff's declaration which shows that the Railway Company participated in the negligence of Hurst, Cox and Voils; the allegation, as more than once stated, is to the contrary. So that it is respectfully urged that the ingenious method of pleading and the many assertions of joint and concurrent negligence, as well as the assertions that Hurst, Cox and Voils were representatives of the Company when they committed the alleged acts of negligence, and all the conclusions of the pleader should be disregarded and the facts stated looked to as determining the relations of the parties to

each other and the jointness or separateness of the controversies set up.

It is respectfully submitted that the decisions of the State courts of Georgia do not militate at all against our contention. The case of Southern Railway Company vs. Grizzle et al., 124 Ga. 735, is based upon an injury to a third person at a crossing, where both the Railway Company and the engineer were negligent on account of the rate of speed at which the train was run over the crossing. The negligence of the Railway Company in that case was joint and concurrent with that of the engineer. This is identical with the case of Railroad Company vs. Dixon, 179 U. S. 131, which case was distinguished in the case of Helms vs. Northern Pacific Railway Company and by Judge Speer in the case of Atlantic Coast Line Railroad Company vs. Bailey.

The Supreme Court of Georgia, however, in the case of Western & Atlantic Railroad Company vs. Exposition Cotton Mills, 83 Ga. 441, has decisively held that a common law cause of action is separate and distinct from one based upon a Statute, and this ought to be decisive of the question in the case.

This decision has been followed in the case of C. & W. C. R. R. Co., 113 Ga. 15, where the Court says:

"Where an action is brought solely upon a common law liability, it is error to allow an amendment thereto, which seeks a recovery upon a statutory liability; such an amendment will add a new and distinct cause of action."

In the case of Cavanaugh, 120 Ga., 67, this language is used:

"An action founded under the Civil Code 2298 cannot be converted into a suit upon the common law liability for negligence. The liability in the first instance is statutory, and in the other it exists at common law."

Each of these cases quote with approval the case in the 83 Ga., above stated.

It will be observed by inspection of the declaration in this case that the action against the Railway Company and against the fellow servants are combined and blended in one count, thus declaring on a common law right of action as against one defendant and a statutory right of action against another defendant in the same count. In the case of Kendrick 81 Missouri 521, the headnote is in these words:

"A common law action for negligence cannot be joined in the same count with one for statutory negligence."

This decision so far as we have been able to find has never been questioned. If this is the law there was a separable controversy and the case removable.

In the case of McDormant, 87 Missouri, 286, it is decided that an action for negligence of a fellow servant could not be blended in the same count with one for the negligence of a vice-principal. It has likewise been held that an action for a separate and joint tort cannot be joined against two defendants and that a recovery cannot be had against two defendants where it is sought against one upon a written contract, and against both upon an oral agreement.

Addecker vs. Schrubee, 45 Iowa, 315.

We have shown by the authorities that a common law

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cause of action is a separate and distinct cause of action from one based upon statute. We have also shown that two separate causes of action cannot be joined in the same count, nor can one be maintained by adding the other. The declaration in this case has joined the two in one count. It would follow therefore, that a separable controversy was thereby made, and that the Railway Company had the right to remove the case into the Federal Court. From all the authorities the rule deducible seems to be that in order for a plaintiff to recover against two joint defendants in tort, the law must require at least the same proof against each. The fact that they might set up different defences would not prevent a jointure, but so far as plaintiff is concerned, the allegations to make a joint cause, must be such that he will close his evidence and have made a case against both at the same time and with the same evidence.

In the case at bar plaintiff could show his injury, that it was caused by the running of the engine or other machinery, and the absence of negligence on his part, and he would have made a case against the Railway, but not against the other defendants. To make out a case as plead it would be necessary for him to make separate and distinct proof and to make out two cases. He would have to invoke separate rules of law and the Judge would be required to charge different principles to the Jury.

4. By an inspection of the petition, it will be seen that a perfect case is made against the Southern Rail-

way Company, independent of the other defendants. By eliminating every allegation that refers to Hurst, Cox, and Voils, the petition still alleges that it was the duty of the Southern Railway Company to keep the switch into which plaintiff ran, closed. That the company had failed to discharge this duty and in consequence thereof plaintiff below was injured. This made a case for recovery against the company and constituted a controversy, between Miller and the Railway Company with which the Co-defendants were not concerned, or at any rate were not necessary parties.

The 3, 4, 5, 6, 7, and 8 paragraphs of Plaintiff's petition are as follows:

3.

"On the 17th day of June, 1904, plaintiff was in the employment of the defendant railway company, as engineer on a freight train. On said June 17, 1904 plaintiff was going north on freight train No. 72. Upon leaving Atlanta, and at Armour's station, plaintiff received an order to the effect that train No. 81 had the right of track over No. 72 between Lula and Suwanee. It is alleged that under the defendant railway's rules and regulations, the plaintiff's train No. 72, was a superior train to No. 81, plaintiff's train being a second class train, and No. 81 being a third class train, and, moreover, No. 72 being north bound, which gave it the right of way over No. 81 which was south bound. The order aforesaid, therefore, gave the plaintiff the right to carry his train to the station of Suwanee.

4.

Accordingly, the plaintiff proceeded to run to Suwanee, and when the plaintiff got to Suwanee, he received another order from the defendant railway's au-

thorities, which directed him to meet No. 81 at Buford, further up the road, and under this order plaintiff proceeded with his train to Buford where he was directed to meet No. 81.

5.

When plaintiff got to Buford, as was his duty he waited until further orders, and waited in the neighborhood of three hours, at which time he received another order from the defendant railway's authorities, to the effect that No. 81 had been annulled between Flowery Branch and Armour's station. It is alleged that under defendant railway's rules a train which is twelve hours late loses, without any order at all, all its rights, and it is alleged that No. 81 was more than twelve hours late at all points north of Flowery Branch, and it is alleged that this order, in thus annulling its rights below or south of Flowery Branch, effectually took No. 81 off of the road, and made it a dead train, and allowed plaintiff's train to proceed on its own rights, and to proceed as a superior train to No. 81, and without any regard to No. 81.

6.

Upon receiving this order plaintiff pulled out from Buford and proceeded with due care to run to Flowery Branch. When plaintiff got to Flowery Branch, and when he was about five rails away from the south switch at said point, plaintiff discovered (which is alleged to be the fact) that the switch was turned wrong, and from the main line, and so as to throw the train into the siding. Plaintiff immediately shut off his engine, and put his air into the emergency. It was all he could do, inasmuch as No. 81 was standing in the siding point, and to avoid being killed or mangled in the collision, and constrained by the emergency to do so, plaintiff in the exercise of due care, jumped from the engine, and in doing so was greatly and permanently injured.

7.

In a few seconds after plaintiff's jump the engines did collide with a terrible crash upon said side track.

8.

It is alleged that the plaintiff was free from fault."

These allegations in effect charged,

First: That the Plaintiff Miller was under orders from the defendant company to run his train to Flowery Branch, with right of way over all other trains.

Second: That plaintiff under this order had the right to rely upon the defendant to have the switch turned in such a way as to allow Plaintiff a safe track.

Third: That the defendant company negligently allowed the switch to be opened when plaintiff reached Flowery Branch.

Fourth: That a collision was inevitable in consequence of this negligence of defendant.

Fifth: That plaintiff was free from fault.

Sixth: That plaintiff was injured.

Had the plaintiff stopped with these allegations he had made a case authorizing a recovery against the defendant company.

Had he showed by evidence the alleged facts he could have recovered. Indeed, under the rulings in Georgia, had he shown that he was free from fault, the law would have implied negligence against the defendant Company; or had he showed negligence on the part of the Company by leaving the switch open after the Company had given orders to run to and through Flowery

Branch, the law would have presumed the absence of negligence on his part.

The Central Railroad vs. Rouse, 77 Ga., 393.
Georgia Railroad vs. Bryan, 77 Ga., 429.
Georgia Railroad vs. Kenney, 58 Ga., 485.

In the discussion in the last case the Chief justice lays down the rule as follows, "After proving the fact and the degree of the injury, if the plaintiff will show himself not to blame, the law then presumes, until the contrary appears, that the Company was to blame; or if he will show, on the other hand that the Company was to blame, the law then presumes until the contrary appears, that he was not to blame. So that, in order to make a prima facie case, and change the onus, he need not go further than to show by evidence one or the other of these two propositions: either that he was not to blame, or that the Company was."

Had the plaintiff stopped with these paragraphs, he would have made a complete case on paper against the Railroad independent of the other defendants. This being true under the decision of the So. Ry. Co. vs. Edwards, 115 Ga. 1022, the case was removable. The head note of that case is as follows: "Although there may, in a suit against two or more defendants, one of whom is a non-resident, be charges of concurrent negligence against all, yet if there be also a distinct charge of negligence against the non-resident alone, sufficient in and of itself to give rise to a cause of action, the case is one involving a separable controversy between citizens of different States, and therefore removable to the United States Court."

The fact that a suit might be brought against each one of the defendants separately, or against them jointly,

does not determine the question whether or not a separable controversy existed.

Pirie 115 U. S., 41, (29 L. E. 331.)

Nor do the allegations of the declaration that the act was a joint and concurrent act of the defendants add anything to the plaintiff's position.

Coker 110 Federal Reporter, 803.

In the case of Yeates, an Illinois case, reported in the 137 Federal Reporter, page 943, it is stated:

"The question whether a declaration states a joint and not a severable cause of action against two defendants is to be determined from the facts alleged, and is not affected by an allegation that the act complained of was the joint and concurrent act of both defendants."

In the case of McIntyre, from South Carolina, reported in the 131 Federal Reporter, the rule is stated thus:

"Though in a suit against two or more defendants, one of whom is a non-resident, there may be charges of concurrent negligence against all, yet, if there be also a distinct charge of negligence against the non-resident defendant alone, sufficient in and of itself to constitute a cause of action, the case is one involving a separable controversy between citizens of different states, and is therefore removable to the Federal Courts."

That case quotes the head note in the 115 Georgia, supra, and approvingly, and the head note just read is almost in the very language. The head note in the 115 Ga. being as follows:

"Although there may, in a suit against two or more defendants, one of whom is a non-resident, be charges of concurrent negligence against all, yet if there be also

a distinct charge of negligence against the non-resident alone, sufficient in and of itself to give rise to a cause of action, the case is one involving a separable controversy between citizens of different States, and therefore removable to the proper United States Court."

It will be observed that all the Courts, including this, hold that regardless of what may be in the recitals in the petition, and of what joint charges may be made, yet if there is a "distinct charge of negligence against a non-resident alone," this is sufficient. ~~In the case at bar the erection of the warehouses, by which the approach of the train was concealed and within two feet of the track, is a distinct charge against the railroad Company, as likewise is the approach of the train without giving the Statutory signal~~.

The case of Chesapeake and Ohio R. R., reported in the 179 U. S., 131, (L. E. 45, 121), upon which the plaintiff below relied, and after which she modeled her petition, was based on the Statute of Kentucky, as appears in the body of the decision, from which I quote:

"By Section 241 of the Constitution of Kentucky, it is provided that whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the corporation and persons so causing the same."

Section 6 of the Kentucky Statutes provided. "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is wilful, or the negli-

gence is gross, punitive damages may be recovered, and the action to recover such damages may be prosecuted by the personal representative of the deceased."

This statute was evidently intended to make the principal and agent both liable for such homicide, and make both liable for punitive damages where the facts authorize. The highest Court of Kentucky had so construed the statute, and hence the Federal Court was bound to follow that construction.

The case of Powers against the Chesapeake & O. R.R. Co., reported in the 160 U. S., 92, (42 L. E., p. 673), is also a Kentucky case arising upon the same Statute. Mark the difference between that statute and the statute of Georgia.

Code Section 3828 provides:

"A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former or one of the latter dies pending the action; the same shall survive in the first case to the children, and in the latter to the surviving child or children. The husband may recover for the homicide of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. A mother, or, if no mother, a father may recover for the homicide of a child minor or sui juris, upon whom she or he is dependent, or who contributes to his or her support, unless said child have a wife, husband, or child."

The Kentucky Statute expressly provides that the

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corporation and its agents or servants causing the same shall be liable and provides who may recover. The Georgia Statute provides who may recover, but leaves the common law undisturbed as to who shall be liable.

The case in the 179th U. S., above cited would not be binding on the Courts of Georgia, not only because it was construing a Kentucky Statute different from a Georgia Statute, but because the question as to who is liable, and as to separate liability having been fixed by the Supreme Court of Georgia, the Supreme Court of the U. S. would be bound by that rather than the Georgia Court by it.

Justice Lumpkin writing the opinion in the 115 Ga., Supra, while he did not undertake to so express, evidently had doubt in his mind as to the binding effect of this case. He says:

"The decision in this case therefore seems to be authority for the proposition that in so far as related to the joint acts of negligence the case made by the plaintiff's petition would not be one which could properly be removed to the U. S. Court. Be that as it may, however, we are quite confident that, because of that paragraph of the petition specially mentioned above, the case was removable."

Taking the allegations made in the whole petition and giving to them the construction most favorable to the plaintiff, yet there are clearly two controversies; one against the Southern Railway Company because of the negligence of its servant; the other against the servant himself because of his own recklessness and wantonness. The controversy with the railroad company is because

of the act of its agent, for which the policy of the law makes it responsible; that with the engineer is upon his own personal responsibility for his own reckless and wanton act. The Southern Railway Company is responsible to third persons for the negligence of its agent; but for the negligence merely, the agent is not responsible to third person.

Ewell Evans on Agencies, 438.

Negligence is negative in its character, it is the omission to perform some duty.

Miller, etc. 91 U. S. 489.

It implies nonfeasance and is contradistinguished from misfeasance. To make the agent responsible to third person there must be some positive acts of wrong on his part. The whole doctrine is clearly stated in Story on Agency, paragraph 303, in these words:

"We come, in the next place, to the consideration of the liabilities of agents to third persons in regard to torts or wrongs done by them in the course of their agency. * * * And the distinction ordinarily taken is between acts of misfeasance or positive wrongs, and nonfeasance or mere omission of duty by private agents. The master is always liable to third persons for the misfeasance and negligence and omission of duty of his servant in all cases within the scope of his employment. So, there, the principal in like manner is liable to third persons for the like misfeasance, negligence, and omissions of duty of his agent, leaving him to his remedy over against the agent in all cases when the tort is of such a nature as that he is entitled to compensation. The agent is also liable to third persons for his own misfeasance and positive wrongs. But he is not liable to third persons for his own nonfeasance or omissions of

duty in the course of his employment. His liability in these latter cases is solely to his principal."

It has been held by this Court that in an action against a principal for the acts of its agent it is liable not only for acts of negligence, but also for wilful and malicious acts done in the course of such agent's employment; but in such an action the principal is liable only for compensatory damages.

Vicksburg & M. R. R. vs. Putnam, 118 U. S., 545. (30 L. E. 257.)

Such principal is not responsible in punitive or vindictive damages or smart money unless the principal participated in the wrongful act of its agents, expressly or impliedly, by its conduct authorizing or approving of, it either before or after it was committed.

Lake Shore R. R., 147 U. S., 101. (37 L. E. 97.)

"A corporation like a natural person, may be held liable in exemplary or punitive damages for the acts of an agent within the scope of his employment, provided the criminal intent necessary to warrant the imposition of such damages is brought home to the corporation. So a a railroad corporation cannot be charged with punitive or exemplary damages for the illegal, wanton or oppressive conduct of a conductor of one of its trains to a passenger.

Lake Shore R. R., 147 U. S., 101. (37 L. E., 97.)

III.

The next question for consideration is whether or not, after the case had been filed in the State Court, and removed into the Federal Court on account of adverse citizenship, the State Court could again take jurisdiction

at the instance of the plaintiff below. The only practical difference in the two cases is the fact that the plaintiff joined three of his fellow-servants in the last suit. If the Court had lost jurisdiction of the cause of action against the Southern Railway Company, joining these three defendants could not restore jurisdiction. This question was decided by the Supreme Court of Georgia adversely to our contention by a divided Bench in the case of McIver vs. F. C. & P. R. R. Co., 110 Ga. 223, and Chief Justice Simmons and Mr. Justice Little dissented. I beg to use their dissenting opinion as part of my argument. It is as follows: "I cannot concur in the ruling made in this case by a majority of the Court. In my opinion when a suit is commenced in a State Court and removed to the Federal Court under the law of Congress, not only the actual case pending, but the cause of action upon which it is founded, is also removed, and, after dismissal or nonsuit in the Federal Court, another suit on the same cause of action cannot be entertained by the State Court, although in the second action the damages are laid in an amount less than the limit fixed by the Act of Congress to entitle a defendant to removal when there is diverse citizenship. As was said by Mr. Justice McLean in the case of Gordon vs. Longest, 41 U. S. 97. 'One great object in the establishment of the Courts of the United States, and regulating their jurisdiction, was to have a tribunal in each State, presumed to be free from local influence'; and it was doubtless the purpose of Congress in providing for the removal, by a non-resident defendant, of a case brought against him in the State Court to protect such non-resident in the trial of his case from the local influence which might exist in favor of the resident plaintiff in the State Court. This purpose would be entirely defeated if, after a plaintiff has instituted an action to

recover damages for an injury which she claims to have sustained by reason of the wrongful act of the non-resident defendant, as in this case, and has named a particular amount as the proper measure of her damage, and exercising the right conferred by the Congress, the defendant by lawful proceedings stays the jurisdiction of the State Court and brings the action before the Federal Court for determination, and when that case has been dismissed in the Federal Court, the plaintiff may again bring and maintain her action against the same defendant for the same causes for which she first complained in the State Court, by arbitrarily fixing her damages in the second suit at a less amount, so as to place the last case brought, out of the jurisdiction of the Federal Court. The amount involved in the controversy is, under the Act of Congress, an incident. Congress had for its object in providing for the removal of causes, the better protection of aliens and non-residents. The State Court would be no less competent to deal with a cause involving Twenty-One Hundred ($2100.00) Dollars than it would be to deal with a cause involving Nineteen Hundred ($1900.00.) While the right of removal exists only in a case where the sum involved is not less than that named in the Statute, yet the consideration which moved the minds of the lawmakers to authorize the removal, rested in the purpose to provide a trial free from local influence which it was thought might be prejudicial to the defendant's cause, and not on the particular amount involved, except in so far as the importance of the case to the defendant was concerned. In other words, the prerequisite to removal, that a case should involve not less than two ($2,000.00) thousand dollars, was required, because of the intention to limit such removal to cases which were deemed particularly important on account of the amount involved. As to those cases not deemed particularly important, the right of removal on account of diverse citizenship was not granted. Hence, in our opinion, the amount

involved in a suit is to be considered only with reference to the question whether it may be removed. If it has once been removed, that cause, that controversy, stays removed. When it is taken out of the jurisdiction of the State Court, that same cause between the parties cannot be assumed by it—not because of the amount involved, but because, being a case which was authorized by law to be removed as originally brought, the removal has the effect of vesting jurisdiction of that cause, in all its phases, in the Federal Court, which can alone finally adjudicate the controversy existing between the parties on the issues made by the pleadings.

In Kern vs. Huidekoper, 103 U. S. 485, it was said: 'The suit and the subject matter of the suit are both transferred to the Federal Court by the same act of removal,' etc. In my opinion the right of a plaintiff, after the removal of a case has been legally effected, to renew the action in the State Court after a dismissal in the Federal Court, is not an open question in this State. It was ruled by this Court in the case of Cox vs. E. T. V. & G. R. R Co. 68 Ga. 446, that when a case has been removed from a State Court to the Circuit Court of the United States, the jurisdiction of the former ceases, and after nonsuit in the Federal Court, the case cannot be renewed in the State Court within six months, so as to avoid the Statute of limitation. By a provision of our State law, a case which has been dismissed may within six months be renewed, and the Statute of limitations can only be made to apply to the time and the date at which the first suit was begun, in determining the question whether the last suit was barred by the lapse of time. The plaintiff in the Cox case, supra, sought to make this rule apply to the renewal of his case in the State Court from which it had been originally removed to the Federal Court, and he was there nonsuited. In delivering the opinion of the Court, Chief Justice Jackson said that, the act of removal *ipso facto* tranfers the jurisdiction of the cause to the Circuit Court of the

United States, and divests that of the State Court. * * * Therefore, when it appeared that the plaintiff himself proved, in order to take his case without the Statute of limitations, that it had been removed and adjudicated by the United States Court, he removed himself out of the Court, and was properly nonsuited.' It is said in the opinion of the majority that the exact question under discussion was not involved, and that the language used by the Chief Justice was *obiter dicta*. On the contrary, I conceive the case affords a direct ruling on the question involved. The point in question has also been expressly decided by the Supreme Court of Ohio, in the case of Balto. & Ohio R. R. Co. vs. Fulton, reported in the 53d N. E. Rep. 265. That Court ruled the question in the following language. 'Where a case that may be is duly removed from a State to a Federal Court, the jurisdiction of the State Court over the cause at once ceases and it can take no further step therein; and if, thereafter, the case is disposed of in the Federal Court otherwise than on its merits, the plaintiff cannot recommence the action in the State Court, although under like circumstances he might have done so had the cause not been removed.' The reasoning of the court seems to me not only to be sound, but conclusive.

It is based on the proposition that the Federal Court, having acquired jurisdiction of the action by its removal from the State Court, must on the principle and the reason of the Statute, retain it for all purposes—for the purpose of determining whether it should be reinstated, or recommenced after it had been dismissed, or stricken from the docket, as well as for its determination on the merits. It was also stated, that, in the opinion rendered in the case, the jurisdiction of the Federal Court 'in such cases does not merely embrace the suit brought and removed, but any suit thereafter brought on the identical cause of action, after a former suit has been dismissed by it, until the cause of action has been Ex-

tinguished by a judgment on its merits.'

The Chief Justice agrees with the views above expressed and we both think that the judgment of the Court below should have been affirmed."

The dissenting opinion in that case has been practically recognized as the law in the case of Webb vs. Sou. Cotton Oil Co. 131 Ga., 682. The decision last referred to was rendered by the present Chief Justice and is only a head-note decision, which is as follows:

"1. A suit brought in a Court of this State and properly removed by the defendant, to the Federal Court, having concurrent jurisdiction thereof, and there dismissed on plaintiff's motion, cannot, under Civil Code, Sec. 3786, be renewed in a State Court within six months of such dismissal, so as to avoid the bar of the Statute of limitations. Cox vs. East Tenn. etc., R. Co. 68 Ga., 446. See also Constitution Pub. Co. vs. DeLaughter, 95 Ga., 17 (21 S. E. 1000) Cox vs. Strickland, 120 Ga., 103 (47 S. E. 912.)

2. In Cox vs. East Tenn. etc. R. Co. 68 Ga. 446, it was held that where a case had been removed from a State Court to a Federal Court, and, after the time prescribed by the Statute of limitations as applicable to the cause of action had elapsed, a nonsuit was granted in the latter Court, the case could not be rebrought in the State Court within six months, so as to avoid the bar of the Statute of limitations. As applied to such a case, that decision, upon review, is affirmed. McIver vs. F. C. etc., R. Co., 110 Ga. 223, (36 S. E. 775, 65 L. R. A. 427.)

3. Section 3786 of the Civil Code provides: 'If a plaintiff shall be nonsuited, or shall discontinue or dis-

miss his case, and shall recommence within six months, such renewed case shall stand upon the same footing as to limitation with the original case; but this privilege of dismissal and renewal shall be only exercised once under this clause.' This section is a codification of the acts of 1847 (Cobb's Dig. 569) and 1856 (Acts 1855 6, p. 237.) Constitution Pub. Co. vs. DeLaughter, supra.

4. The provisions of the Civil Code, Sec. 3786, apply only to cases pending in State Courts, as the act of 1847 (Acts 1847, p. 569) declares: 'That whenever any case now or hereafter pending in any of the Courts of this State * * * shall be discontinued, dismissed, etc., the plaintiff may renew the same within six months. Code section 3786 is a codification of this act of 1847 and of the 33d section of the act of 1856 (Cobb's Dig. 237.) Constitution Pub. Co. vs. DeLaughter, supra.

5. In view of the foregoing, the Court did not err in dismissing the petition on general Demurrer.

If a plaintiff can file his suit against a non-resident in a State Court, and the non-resident under the Act of Congress regularly removes the case and cause of action into the Federal Court the plaintiff can then dismiss and sue the case, in a State Court, and thus give the State Court jurisdiction by joining non-essential defendants it is apparent that the protection Congress undertook to give non-resident litigants has failed.

We are not forgetful of the fact that a number of the States have held that when a case is dismissed, it leaves the plaintiff in control of the cause of action and he can

select the forum. This is possibly true, as long as the cause of action deals with State laws, only; but when a litigant brings an action against a non-resident, and the Federal Courts, under the authority of the Federal Statutes, takes charge of the case, the plaintiff is then powerless to control the same in any other Court. The reason underlying the question is similar to that of the regulation of commerce among the States.

This Court has frequently held that a State, under its police power could regulate any incident to commerce not acted on by Congress; but that the moment the Federal Government undertook to regulate or control, that action superceded all authority of the State. The Federal Courts are certainly not an exception to the principle mentioned. As long as the cause of action is not touched by the Federal Courts, the plaintiff may dismiss and sue in any other State Court, he sees fit; but when a Federal Court in consequence of adverse citizenship, and the purpose of the general Government to furnish a forum removed from local prejudice to a citizen of a foreign State, and by authority of Congress, takes charge of a given case and the cause of action upon which it is predicated, the State and its Courts, and the plaintiff, all lose their control thereof and must submit to the authority superior in its character.

The Superior Court of Hall, having lost jurisdiction of the case and cause of action, and the U. S. Circuit Court, having taken the same, no State Court thereafter could have jurisdiction and the act of the City Court of

Hall, therefore, was void, and the Court of Appeals should have so held.

Respectfully submitted,

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DARK PAGE BLEED THRU

JAMES H. MAHER

United States Supreme Court

OCTOBER TERM, 1909.

No. 122.

SOUTHERN RAILWAY COMPANY, ET AL.,
PLAINTIFFS IN ERROR,

vs.

W. M. MILLER,
Defendant.

BRIEF FOR DEFENDANT IN ERROR.

REUBEN R. ARNOLD,
REUBEN ARNOLD,
Attorneys for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1909.

No. 122.

Southern Railway Co., et al., Plaintiffs in Error, vs. W. M. Miller, Defendant in Error.	In Error to the Court of Appeals of the State of Georgia.

BRIEF FOR DEFENDANT IN ERROR.

The Federal questions sought to be made in this case are found on pages 9 and 10 of the printed record and are:

First: That the Court erred in adjudging that under the acts of Congress providing for the removal of a case from a State Court into the United States Circuit Court, a case once removed could be dismissed in that Court and again sued in the State Court.

Second: That the Court erred in holding that the State Court had jurisdiction to try the case after the same case had been removed into the United States Circuit Court, and in holding that under the Acts of Congress providing for such removal, the State Court could again take jurisdiction thereof, and in holding that the plea to the jurisdiction should not have been sustained below.

Third: That the Court erred in holding that the petition on its face did not make a severable controversy authorizing the Southern Railway Company to remove the case into the United States Circuit Court.

These questions really amount only to two propositions and are thus stated in the brief of counsel for plaintiffs in error, and we will discuss them in the order in which they are stated in the brief, to-wit: (See pages 25 and 26 of Brief of Plaintiffs in Error):

First: Was Miller's case removable by the Southern Railway Company as a separable controversy?

Second: Did the State Court have jurisdiction to try the case of Miller against the railway company and the three individual defendants after Miller's suit against the railway company alone, which had been removed into the Circuit Court of the United States for the Northern District of Georgia, had been there dismissed by Miller and judgment of the Court taken to that effect?

CASE NOT SEPARABLE CONTROVERSY.

Miller's action having been brought jointly against the railway company and three of its employees who were guilty of the negligent acts causing the plaintiff's injury, the suit was a joint one and could not be removed: Railway vs. Dickson, 179 U. S. 131; Powers vs. Railroad, 169 U. S. 92; Railroad vs. Wangelin, 132 U. S. 599.

If the plaintiff elects to bring a joint action, the defendant has no right to say that the action shall be severable: Railroad vs. Ide, 114 U. S. 52.

Even though the plaintiff has misconceived his cause of action and has no right to prosecute the same jointly, still if the action is joint in form upon the face of the complaint, the Federal Courts will not undertake to pass upon the question as to whether the defendants are properly joined and will treat the action as being that which the plaintiff intended to make it, namely: a joint suit: See Railroad vs. Thompson, 200 U. S. 206; Railroad vs. Bohon, 200 U. S. 221.

But this action is well brought jointly against the defendants. Georgia having a statute which makes a railroad responsible to one employee for the negligence of a fellow-servant, the negligent servant is liable to his fellow-servants for injuries inflicted by such negligent servant: See Morrison vs. Railroad, 74 Pac. 1064 (Wash.): s. c. 33 A. & E. R. R. Cases, 233; Howe vs. Railroad, 30 Washington, 569, s. c. 60 L. R. A. 949; Abel vs. Railroad, 73 S. C. 173.

We contend that the earlier Federal cases in the Circuit and District Courts, of which Warrax vs. Railroad, 72 Fed. 637, is a specimen, have been overruled in effect by the decisions of the Supreme Court of the United States, notably in the case of Railroad vs. Dickson, 179 U. S. 131, which in express terms overrules the Warrax case and necessarily the other cases following it.

As to defendants' point that Miller's suit against the railway company was based upon the Georgia statute rendering a railroad

company liable to an employee for the acts of co-employees, and that the right of action against the individual defendants was based upon a common-law right—we say it was a matter for the State Courts to decide as to whether such defendants could be joined in the same action and does not raise in any way a Federal question. Furthermore, the particular source from which the right of action against the defendants originates, whether statutory or common-law, would not prevent the different defendants being joined, if their negligent acts all concurred to produce one injury, as in this case.

As to the point in the brief for plaintiffs in error that the acts of negligence charged against the individual defendants who were employees of the Southern Railway Company, were acts of nonfeasance merely, and that for such acts only the master is liable,—this proposition has been held untenable in negligence cases in Railway vs Grizzle, 124 Georgia, 735; Osborn vs. Morgan, 130 Mass. 102; Bell vs. Josselyn, 3 Gray, 309.

To quote the language of Gray, Chief Justice, in Osborn vs. Morgan, 130 Mass. 102:

"And he (the employee) cannot, by abandoning its execution midway (the execution of his employer's work) and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance, doing improperly."

If an employee is intrusted by his master with a particular piece of work, whatever he does or omits to do in the prosecution of that work, if the same amounts to negligence, is misfeasance: see the authorities above quoted. If the employee never entered upon the work at all, this might perhaps be nonfeasance, such for instance as the failure of the engineer to go, when his duty required him to go out, upon a particular run; but if the employee undertakes a work, such as an engineer untaking to run a schedule with his train, whatever he negligently does or negligently omits to do in this work, to the injury of some other person,—this is misfeasance.

But we repeat, it was for the State Court to decide whether it would

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permit persons to be joined who were guilty of misfeasance or non-feasance. No Federal question is raised in this particular.

AFTER DISMISSAL IN UNITED STATES COURT, CASE CAN BE BROUGHT OVER IN STATE COURT.

The next question is, did the State Court have jurisdiction over Miller's suit when he brought it over again against the railway company and certain individuals, the same suit having once before been filed in the State Court against the railway company alone, removed to the Federal Court, and there dismissed voluntarily by the plaintiff and stricken from the docket of the Federal Court, and judgment for costs rendered against the plaintiff upon the termination of the case by the order of court? (See Record, page 36).

The plaintiffs in error cite six cases to sustain their novel contention, none of which, we respectfully submit, sustain it.

On the contrary, the overwhelming weight of authority is that, upon the voluntary dismissal of a suit in the United States Court, the jurisdiction of the United States Court is ended, that it no longer has control over the cause of action, that its control over the cause of action only lasted while the case was actually pending, and that when the case is dismissed the jurisdiction of the United States Court is wholly devested and the plaintiff is just as free to bring his suit over again as he was when it was originally filed in the State Court: See Young vs. Southern Bell, etc. Co., 55 S. E. 765 (S. C.); Gassman vs. Jarvis, 100 Fed. 146; Texas Cotton Products Co. vs. Starnes, 128 Fed. 183, affirmed in 66 C. C. A. 673, 133 Fed. 1022; McIver vs. Florida, C. & P. R. Co., 110 Ga. 223, 65 L. R. A. 437, 36 S. E. 775; Cleveland, C. C. & St. L. R. R. Co. vs. Reese, 93 Ill. App. 657; Cleveland, C. C. & St. L. R. Co. vs. Lawler, 94 Ill. App. 36; Foley vs. Cudahy Packing Co., 119 Iowa, 246, 93 N. W. 284; Rodman vs. Missouri P. R. Co., 65 Kan. 645, 59 L. R. A. 704, 70 Pac. 642; Swift & Co. vs. Hoblawetz, 10 Kan. App. 48, 61 Pac. 969; Adams Exp. Co. vs. Schofield, 111 Ky. 832, 64 S. W. 903; Stephenson vs. Ill. C. R. Co., 25 Ky. L. Rep. 442, 75 S. W. 260; Stevenson vs. Illinois C. R. Co., 117 Ky. 855. 79 S. W.

767; DeWitt vs. Chesapeake & O. R. Co., 25 Ky. L. Rep. 2019, 79 S. W. 275; Nipp vs. Chesapeake & O. R. Co., 25 Ky. L. Rep. 2335, 80 S. W. 796; S. F. Dana & Co. vs. Blackburn, 28 Ky. L. Rep. 695, 90 S. W. 237; Krueger vs. Chicago & A. R. Co., 84 Mo. App. 358; Fox vs. Jacob Dold Packing Co., 96 Mo. App. 173, 70 S. W. 164; Fleming vs. Southern R. Co., 128 N. C. 80, 38 S. E. 253; Hooper vs. Atlanta, K. & N. R. Co., 106 Tenn. 28, 53 L. R. A. 931, 60 S. W., 607; Illinois C. R. Co, vs. Bentz, 108 Tenn. 670, 58 L. R. A. 690, 91 Am. St. Rep. 763, 69 S. W. 317 (implied); Texas & P. R. Co. vs. Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134. See also Bush vs. Kentucky, 107 U. S. 110, 27 L. ed. 354, 1 Sup. Ct. Rep. 625, referred to in the reported case.

The cases cited by plaintiffs in error only go to the extent of holding that when a defendant removes a case from a State Court to a Federal Court, so long as that case is pending in the Federal Court, the jurisdiction of the State Court is completely ousted. This proposition is entirely consistent with the other proposition that when the jurisdiction of the Federal Court in the case ceases by the dismissal of the case, that the plaintiff is then at liberty to bring it anywhere he chooses, provided he is not barred by the statute of limitations.

Our position is also entirely consistent with the decision in Cox vs. Railroad, 68 Georgia, 446, which merely holds that the State law allowing a suit otherwise barred by the statute of limitations, to be renewed within six months from the date of its dismissal, did not apply to a dismissal of a case in the United States Court, the State statute being restricted to dismissals in the State Courts: See McIver vs. Railroad, 110 Georgia, 223.

In the case at bar, Miller did not rely upon the six months renewal statute, but brought his second action within the general Georgia limitation of two years from the date of the injury.

Plaintiffs in error, on page 73 of their brief, misapprehend the decision in Webb vs. Southern Cotton Oil Co., 131 Georgia, 682, in stating that the dissenting opinion in the case of McIver vs. Railroad, 110 Ga. 223, has been practically recognized as the law, in the case of

Webb. On the contrary, the case of Webb (131 Ga. 682) merely reiterates the doctrine that the section of the Georgia Code, 3786, which allows the re-commencement of a suit within six months after its dismissal, even if barred by the statute of limitations otherwise, "applies only to cases pending in State Courts," and the Court in the Webb case cites the language of the original Act, as follows:

"That whenever any case now or hereafter pending in any of the Courts of this State shall be discontinued, dismissed," etc., the plaintiff may renew the same within six months.

Only one case can be found sustaining the contention of counsel for plaintiffs in error, and that is the case of Railroad vs. Fulton, 59 Ohio St. 575, which was based upon a mistaken interpretation of the case of Cox vs. Railroad, 68 Ga. 446. That the Ohio Court misapprehended the decision of the Georgia Court in the Cox case is fully shown in the opinion of Justice Cobb in the McIver case, 110 Ga. 223, and in the opinion of the South Carolina Court in the Young case, 55 S. E. 765, and by the learned author of the note to 7th L. R. A. (N. S.), on page 501.

ARGUMENT.

Case a Joint One and Not Removable.

The declaration in this case was a joint suit alleging that because of the joint negligence of all four defendants, a collision occurred between the train on which plaintiff was engineer and the train which the individual defendants were operating. Not a single act of negligence is charged against the Southern Railway Company in this petition in which some one or all of the individual defendants did not participate. In other words, all of the individuals whose negligence, as representing the railway company, brought about the collision, are joined as defendants. Therefore, there can be no claim that there is any act of negligence in this petition charged against the defendant railway company, which is not charged against some of the individual defendants.

There was no claim made in the lower court that the purpose of joining these defendants was to deprive the Federal Court of jurisdiction. Such question, therefore, is not made in this record.

Paragraph 9 of this declaration sums up the negligence and shows that the defendant Cox was conductor and had entire charge of the crew of No. 81, the opposing train to plaintiff's; that Voils was engineer and that Hurst was front brakeman; and in Paragraph 10, it was shown that it was the duty of each and every one of the defendants to have the switch turned to the main line, so as to keep plaintiff's train on the main line, and it is alleged that each defendant participated in turning the switch away from the main line, and after turning it away, each defendant negligently participated in allowing it to remain in that condition. In Paragraph 11, it is alleged that the actual turning of the switch was by the defendant Hurst and that the failure to turn it right again was the act of the defendant Hurst, and that the defendant Cox, the conductor, was under the duty to see that the switch was turned to the main line. In Paragraph 12, the

defendant Voils, the engineer, was alleged to be negligent in failing to keep a proper lookout to see if the switch was turned wrong, and after discovering that it was turned wrong, in failing to report it to the other members of the crew. Paragraph 13 sums up again the defendants' negligence by saying that it was negligence in the three individual defendants, who represented the defendant railway company, to unlock and cause to be unlocked, the switch, and cause it to be turned from the main line; and Paragraph 14 alleges that the same defendants were negligent in not discovering that the switch was turned from the main line and in failing to turn it back to the main line, it being perfectly patent and visible to them and it being their duty to turn it right. In Paragraph 15, it is alleged that the three individual defendants, representing the defendant railway company, owed the plaintiff the duty of having the switch turned right.

As to the point made by the plaintiffs in error that the individual defendants must join with the corporate defendant in positive acts of misfeasance, we say that the question as to whether such a joinder can be had is not a Federal question in any sense, but a question for the State Court to decide. Should the Federal Courts examine the question, however, it will be found that the defendants were well joined in this case.

A failure to perform an act which would save life becomes a positive act of misfeasance if there be a duty to perform it. A mere act of nonfeasance which would not permit a joinder of the principal and agent is where the agent does not at all enter upon the undertaking, but breaks entirely his contract to perform with the principal; thus if the engineer, conductor, and brakeman in the case at bar had not gone out on the trip at all, their mere nonfeasance, or failure to perform their entire duty would not render them jointly liable with the corporate defendant, but when they undertake the trip and undertake to operate the train and actually engaged in the operation of it, acts of omission which endanger or destroy life become positive torts and acts of misfeasance. We quote the following language from the decision in the case of Grizzle vs. Southern Railway Company, 124 Georgia, 737:

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"An agent is not ordinarily liable to third persons for mere nonfeasance. Kimbrough vs. Boswell, 119 Ga. 201. An agent is, however, liable to third persons for misfeasance. Nonfeasance is the total omission or failure of the agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do. Misfeasance means the improper doing of an act which the agent might lawfully do; or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons. Where an agent fails to use reasonable care or diligence in the performance of his duty, he will be personally responsible to a third person who is injured by such misfeasance. The agent's liability in such cases is not based upon the ground of this agency, but upon the ground that he is a wrong-doer, and as such he is responsible for any injury he may cause. When once he enters upon the performance of his contract with his principal, and in doing so omits, or fails to take reasonable care in the commission of, some act which he should do in its performance, whereby some third person is injured, he is responsible therefor to the same extent as if he had committed the wrong in his own behalf. See 2 Clark & Skyles on Agency, 1207 et. seq. Misfeasance may involve also to some extent the idea of not doing; as where an agent engaged in the performance of his undertaking does not do something which it is his duty to do under the circumstances, or does not take that precaution or does not exercise that care which a due regard to the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation. Mechem on Ag., section 572. As was said by Gray, C. J., in Osborn vs. Morgan, 130 Mass. 102 (39 Am. Rep. 439): 'If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance, doing improperly.' In that case the agent was held liable by the fall of a tackle-block and chains from an iron rail suspended from the ceiling of a room, which fell for the reason that the agent had suffered them to remain in such a manner and so unprotected that they fell upon and injured the plaintiff. In Bell vs. Josselyn, 3 Gray, 309 (63 Am. Dec. 742), Metcalf, J., said: 'Assuming that he was a mere agent, yet the injury for which this action was brought was not caused by his nonfeasance, but by his misfeasance. Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do.....The defendant's omission to examine the state of the pipes, before causing the water to be let on, was a nonfeasance. But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff.'

"In the present case the failure of the engineer to comply with the requirements of the blow-post law was not doing, but the running of the train over the crossing at a high rate of speed without giving the signals required by law was a positive act, and the violation of a duty which both the engineer and the railroad company owed to travelers upon the highway. The engineer having once undertaken in behalf of the principal, to run the train, it was incumbent upon him to run it in the manner prescribed by law; and a failure to comply with the law, although it involved an act of omission, was not an act of mere nonfeasance, but was an act of misfeasance. This view is strengthened by the fact that the blow-post law renders the engineer indictable for failure to comply with its provisions. The allegations of the petition were therefore sufficient to charge O'Neal with a positive tort, for which the plaintiff would be entitled to bring her action against him."

The distinction sought to be drawn by the plaintiffs in error in this case to the effect that the liability of the railway company is statutory, while that of the individual employees grows out of the common law, is a distinction entirely without a difference. The source from which the liability arises cannot possibly make any difference. The question with which the Court at last deals is, Is there a liability? The particular legal source from which that liability emanates is not material and cannot be. Courts give judgments on statutory liabilities as well as common-law liabilities. Persons can join in incurring a statutory liability as well as a common-law liability.

The Georgia law, in Code section 2297, provides that "such companies (railroad companies) shall be liable to such employees as to passengers for injuries arising from the want of such care and diligence;" thus the duty fixed by law which the railroad company owes to these employees is by the statute itself said to be the same duty as is owing to third persons. Section 2323 of the Georgia Code further sweeps away the plaintiff's employment by the Company as interposing any special barrier to a recovery by providing that if the injured person himself was an employee of the Company and was without fault, his employment by the Company is no bar to a recovery.

Thus in Georgia, an employee suing a railroad company stands in the attitude of any other person to whom the railroad company owes a duty. He stands just as a passenger would stand to whom the railroad company owes a duty. He stands just as a member of the public

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on a grade crossing would stand, to whom the railroad company owes a duty. That duty to the employee the railroad company performs through its other employees just as it performs its duties towards passengers and towards members of the public generally. A recovery in each case is governed by exactly the same rules. The doctrine of respondeat superior is made to apply against the master in favor of employees and the employment is no barrier against a recovery.

There can be nothing in the point that an employee cannot bring a joint action against the master and other employees just as a member of the public might bring such an action. It is conceded that he can bring his action against the railroad company; that is matter of every-day practice. Can he not also join with the railway company, its employees whose negligence hurt him? There can be no doubt that the railway company's employees not only owe a duty to exercise ordinary care to the employer railway company, but they also owe a like duty to all other employees. By what authority can it be said that the duty of employees not to hurt persons is limited to passengers and members of the public? Not only can such a doctrine not find any countenance in law, but by express statute it is made a more reprehensible act in a railroad employee to be guilty of negligence which hurts a co-employee than to be guilty of mere negligence which hurts a member of the public.

By Section 115 of the Penal Code of Georgia, which is the Act of 1876, page 111, as amended by the Acts of 1895, page 63, it is provided as follows:

"If any person employed in any capacity by any railroad company doing business in this State shall, in the course of such employment, be guilty of negligence either by omission of duty or by any act of commission in relation to the matters intrusted to him, or about which he is employed, from which negligence serious bodily injury, but not death, occurs to another, he shall be guilty of criminal negligence and shall be punished by confinement in the penitentiary not less than one, nor more than two years, in the discretion of the Court."

The reason this statute does not include death is because negligence

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resulting in death is governed by the laws regulating murder and manslaughter.

It would thus seem from the foregoing penal enactment that any question as to whether the plaintiff's co-servants are liable for negligence which injured him, should be forever set at rest. Any act which is made criminal becomes at once actionable in the civil courts if injury ensues as a result of the crime. To make a certain thing penal raises a certain standard of duty towards any person hurt by the violation of that law.

What difference is there in principle between the case of Southern Railway Company vs. Grizzle, heretofore quoted, and all the other cases where third persons sued railroad companies, joining employees? No court, so far as we have been able to discover, has ever made any distinction between the right of an employee to sue the railroad company and join a fellow-servant and the right of a third person to sue the railroad company and join a servant. On the contrary, such decisions as we have been able to find have held that the same rule applies when the injury is to a servant and the suit is against a co-servant and a master jointly as when the injury is to a third person. Of course this question can only arise in those States which by statute have abolished the common-law proposition that a servant cannot recover for the negligence of a co-servant. In States where the common-law prevails to the effect that a servant cannot recover against the master for the negligence of a co-servant, of course no such question can arise, because the master cannot be sued at all for the negligent acts of a co-servant; but a number of the States have made the master liable in such cases, and in all such States, so far as we have been able to find, the injured servant can join the master and the negligent servant. See Morrison vs. Railroad (Supreme Court of Washington), reported in 74 Pac. 1064, and in 33 A. & E. R. R. Cases (N. S.), 233; Howe vs. Railroad, 30 Wash. 569, s. c. 60 L. R. A., 949; Able vs. Railroad, 73 S. C. 173, s. c. 53 S. E. 592. In the case of Howe vs. Railroad, as reported in 60 L. R. A. 949, 950, the briefs of counsel and

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the opinion of the Court quote all the decisions upon the subject and furnish a most elaborate brief.

The decision of the Court of Appeals of Georgia in the case at bar was based upon the case of Railroad vs. Thompson, reported in 200 U. S., page 206, and a perusal of the Thompson case will show that it is conclusive in this case. We quote the syllabus of the case as follows:

"A case in which plaintiff, in good faith, has elected to sue jointly in tort a foreign corporation and its servants whose misconduct caused the injury complained of, does not—even though such joinder may be improper—present a separable controversy between plaintiff and the corporation, which, under the Act of March 3, 1875, as amended by the Acts of March 3, 1887, and August 13, 1888, can be removed from a State to a Federal circuit court without regard to the citizenship of the individual defendants."

The opinion of Mr. Justice Day in this case of Thompson goes elaborately into the whole doctrine and cites the Dixon case, 179 U. S. 131; Ide case, 114 U. S. 52, and numbers of other authorities which seem conclusive. It seems to us the following portion of Mr. Justice Day's opinion on page 218 answers the entire contention of the plaintiffs in error:

"Does this become a separable controversy within the meaning of the Act of Congress because the plaintiff has misconceived his cause of action, and had no right to prosecute the defendants jointly? We think, in the light of the adjudications above cited from this court, it does not. Upon the face of the complaint—the only pleading filed in the case—the action is joint. It may be that the State Court will hold it not to be so. It may be (which we are not called upon to decide now) that this Court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question, the law looks to the case made in the pleadings, and determines whether the State Court shall be required to surrender its jurisdiction to the Federal Court."

Further on in the opinion, the Court says:

"The Federal Courts in some States hold a different rule as to the doctrine of fellow-servants from that administered in the State Courts, and in other ways administer the common law according to their own views. It has not been suggested that a right of removal should arise from such differences. No more has Congress given the right where

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the State permits an action to be prosecuted jointly which would be held to be several only in the Courts of the United States. The applicant for removal has been duly summoned into a cause in course of prosecution in the State Court. All of the defendants not being non-residents, it can remove only if it presents a separable controversy, which can be wholly determined between itself and the plaintiff. The test of such controversy, as this Court has frequently said, is the cause of action stated in the complaint. That is joint in character, and there is no attack upon the good faith of the action."

The Supreme Court of the United States in the case of Railroad vs. Bohon, 200 U. S. 221, reiterated the doctrine of the Thompson case in a case almost exactly similar.

The opinion of Chief Judge Benjamin H. Hill, of the Georgia Court of Appeals, in deciding the case at bar, is so able and well-considered that we quote copiously from it. (A report of this case appears in 1st Georgia Appeals Reports, page 616, and the headnotes of the decision are quoted on page 3 of the Record in this case). Our quotation is from pages 618, 619, 620, 621 and 622 of the opinion, to-wit:

"The questions raised by this record are fully covered and controlled by the decision of the Supreme Court of this State in the case of the Southern Railway Company vs. Grizzle, 124 Ga. 735, and by the decision of the Supreme Court of the United States in Alabama Great Southern Railway Co. vs. Thompson, 200 U. S. 206. The plaintiff in error insists that the petition against the defendants makes a distinct charge of negligence against the defendant railway company, the non-resident defendant, sufficient in and of itself to give rise to a cause of action, and the case, being one involving a separable controversy between citizens of different States, is therefore removable to the proper United States Court. In support of this contention, Southern Ry. Co. vs. Edwards, 115 Ga. 1022, is cited. In the Edwards case, while the declaration made charges of concurrent negligence against all of the defendants, there was also a distinct charge of negligence against the non-resident defendant alone; and, for this reason, the Court held that there was a separable controversy between citizens of different States; but the Court further says, that in so far as the negligence charged relates to the joint acts of negligence, the case made by the plaintiff's petition would not be one which could properly be removed to the United States Court; and the Court cites, in support of the proposition, the ruling of the Supreme Court of the United States in Railway Co. vs. Dixon, 179 U. S. 131, where it was held that 'When concurrent negligence is charged, the controversy is not separable.' As before shown, there being no act of negligence alleged, in this case, against the non-resident railway company alone, but all the acts of negligence alleged being concurrent, and joined in by all the defendants, the case cannot be removed.

"The allegations in this declaration would seem to bring the case

squarely within the ruling of the Supreme Court of the United States in Alabama Great Southern Railway Co. vs. Thompson, supra. That Court holds as follows: 'The right of the defendant, jointly sued with others, to remove the case into the Federal Court, depends upon the case made in the complaint against the defendants jointly, and that right, in the absence of showing a fraudulent joinder, does not arise from the failure of complainant to establish a joint cause of action.' 'A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of the right to prosecute the suit to final decision in his own way. The cause of action is the subject-matter of controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' The Court, in that decision, reviews all previous decisions on the same subject, and deduces therefrom the statement that 'The case cannot be removed unless it is one which presents a separable controversy wholly between citizens of different States. In determining this question, the law looks to the case made in the pleadings, and determines whether the State Court shall be required to surrender its jurisdiction to the Federal Court, and declares that it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal.' This is well settled in the law, unless the petitioner, in the petition for removal, both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing removal into the Federal Court. There are no such allegations made in this petition. We therefore conclude this part of the case by quoting the words of the Chief Justice in delivering the opinion of the Court in Louisville & Nashville Railroad Co. vs. Ide, 114 U. S. 52: 'A defendant has no right to say that an action shall be several which a plaintiff elects to make joint.'

"The right of the plaintiff to bring this suit against a railway corporation and the engineer, conductor, and brakeman of the train is expressly determined by the Supreme Court of the United States in several cases. 'A railroad corporation may be jointly sued with the engineer and conductor of one of its trains when it is sought to make the corporation liable only by reason of their negligence.' Alabama Great Southern Ry. Co. vs. Thompson, supra. 'The master is responsible for the negligence of his servant in a joint action against both to recover damages for an injury.' Chesapeake & Ohio Railway Co. vs. Dixon, 179 U. S. 131. A similar ruling was made by the Supreme Court of Georgia, in Southern Ry. Co. vs. Grizzle, supra, the second headnote being as follows: 'A railway company and its engineer may be jointly sued for a negligent homicide, where the negligence of the company results solely from the act and conduct of the engineer.'

"It is said that the acts of negligence charged against the individual defendants were all nonfeasance in character, and therefore the agents were not liable with the principal. We do not so construe the acts of negligence set up. They really involve acts both of omission and commission. They present a case not where the agents failed to perform the acts which it was their duty to perform, but where they did

actually perform them, but in a negligent manner. They were all cooperating in the running of the train, and in the specific acts of negligence in reference to the switch, and other acts charged which caused the injury to the plaintiff. 'Nonfeasance is the total omission or failure of the agent to enter upon the performance of a distinct duty or undertaking which he has agreed with his principal to do. Misfeasance means the improper doing of an act which the agent might lawfully do ..... Where an agent fails to use reasonable care or diligence in the performance of his duty, he will be personally responsible to a third person who is injured by such misfeasance. The agent's liability in such cases is not based upon the ground of his agency, but upon the ground that he is a wrongdoer, and as such he is responsible for any injury he may cause. When once he enters upon the performance of his contract with his principal, and in doing so omits, or fails to take reasonable care in the commission of, some act which he should do in its performance, whereby some third person is injured, he is responsible therefor to the same extent as if he had committed a wrong in his own behalf..... As was said by Gray, C. J., in Osborne vs. Morgan, 130 Mass. 102, ... 'If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance, doing improperly..... In the present case, the failure of the engineer to comply with the requirements of the blow-post law was not doing, but the running of the train over a crossing at a high rate of speed without giving the signals required by law was a positive act, and the violation of a duty which both the engineer and the railroad company owed to travelers upon the highway.' Southern Ry. Co. vs. Grizzle, supra. In the instant case, by reference to the declaration, it will be seen that the acts of negligence alleged against the defendants were nearly all acts of positive misfeasance.

"The proposition that the declaration contained a misjoinder of defendants because the liability of the railway company is statutory, and that of the other defendants is common-law liability, we do not think is meritorious. We do not think it makes any difference whether the liability of one defendant arises from statute and the other from common law. The practical question to be decided is, is there a liability, and are the defendants all liable? And the particular source from which the liability of each defendant emanates cannot be material. The court's judgment is based on the liability of the defendant, whether statutory or common law, either one or both.

"Nor do we think that it makes any difference on the question of liability that the plaintiff was an employee. He certainly can bring suit against the employer, and we do not see why he could not join with the employer the employees whose negligence hurt him. In the conduct of their business, the employees of a railway company owe a duty to exercise ordinary care to all other employees. They owe a

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higher duty to passengers, but a duty to other employees like that to members of the public generally. Under the Penal Code, Section 115, it is a crime for a railroad employee to be guilty of negligence which injures a co-employee. This section provides as follows: 'If any person employed in any capacity by any railroad company doing business in this State shall, in the course of such employment, be guilty of negligence, either by omission of duty or by any act of commission in relation to the matters intrusted to him, or about which he is employed, from which negligence serious bodily injury, but not death, occurs to another, he shall be guilty of criminal negligence, and shall be punished by confinement in the penitentiary,' from one to two years. Certainly an act which is thus made criminal is actionable in a civil suit, if injury results from such act. The acts of negligence set out in the declaration in this case against the individual defendants may have amounted to criminal negligence; and if this was true, both the railway company and the individual defendants were liable to the plaintiff, under the statutes of this State. But many Courts have held that the same rule applies to an injury to a servant, when the suit is against the co-servant and master jointly, as when the injury is to a third person. In Morrison vs. Railway Co. (Supreme Court of the State of Washington), 74 Pac. 1064, it was held that an action by a brakeman for personal injuries may be maintained against his employer and the conductor of the train jointly, where the injury is caused from the act of the employee. And the same Court, in Howe vs. Railroad Co., 60 L. R. A., 949, says, 'Master and servant may be joined as defendants in an action for injuries to another servant, caused by the act of the one made defendant, for which the master is responsible.' See also, to the same effect, Able vs. Railway Co., 73 S. C. 173. In this last case the Court holds also that the defendant railway company could not remove the case to the Federal Court."

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PLAINTIFF HAD RIGHT TO BRING CASE OVER IN STATE COURT AFTER DISMISSAL IN UNITED STATES COURT.

Next we will discuss the point made by plaintiffs in error to the effect that Miller's action could not be brought over again in the State Court after it was dismissed in the Federal Court.

It will be borne in mind that Miller's action was brought within two years from the date of the original injury and the statute of limitations in Georgia in cases of this character is contained in Section 3900 of the Code of Georgia, which provides:

"Action for injuries done to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year."

Only one case in the country, so far as we are aware, sustains the view of counsel for plaintiffs in error, and that is the case of Railroad vs. Fulton, 59 Ohio State, 575; the authorities are unanimous that this is the only case, as see the editor's note in the case of Young vs. Southern Bell, etc. Co., 7th L. R. A. (N. S.) 503, and the opinion of Justice Cobb in the case of McIver vs. Railroad, 110 Georgia, on page 228. The Ohio case is based upon a misconception of the decision in the case of Cox vs. Railroad, 68 Georgia, 446, as was fully shown by Justice Cobb in his opinion in the McIver case.

The Cox case in 68 Georgia, 446, was as follows:

Cox originally sued the railroad in the State Court. It was removed to the United States Court. In the United States Court, it was discontinued or non-suited, but when the judgment of non-suit in the United States Court was granted, the bar of the statute of limitations had arisen. The cause of action arose in 1874 and a new suit in the State Court after the non-suit in the United States Court, was brought in 1880. To avoid the bar of the statute, the plaintiff proved that the last suit had been commenced within six months from the dismissal of the case in the United States Court, and thus sought to bring the case within Section 3786 of the Georgia Code, which reads as follows:

"If a plaintiff shall be non-suited, or shall discontinue or dismiss his case, and shall recommence within six months, such renewed case shall stand upon the same footing, as to limitation, with the original case; but this privilege of dismissal and renewal shall be exercised only once under this clause."

The Court decided in the Cox case that this right of renewal applied only to dismissals, non-suits, and discontinuances in the State Courts, and that if a suit was barred by the statute of limitations it could not be brought under this renewal statute, if the dismissal was in the Federal Court. The decision had no application whatsoever to suits brought over again in the State Court after dismissal in the United States Court, when the renewed suit is within the original statute of limitations and where no aid is sought from the six months' renewal statute. The Court in the Cox case may have used some language beyond the scope of the issues about the jurisdiction of the case being transferred to the United States Court, but any such remarks were obiter.

The Supreme Court of Georgia in the case of McIver vs. Railroad, 110 Georgia, 223, cleared up the whole matter and showed the real foundation of the Cox decision and showed that upon the facts, the Cox case was right, and upon pages 228 and 229 of the McIver decision is shown the erroneous conception which the Ohio Court had in the Fulton case, of the Cox case. In the McIver case, the renewed suit was brought, as in the case at bar, within the original two years' limitation and no reliance was placed upon the six months' renewal statute, which was only intended to be available in case the suit was barred by the general statute of limitations.

Counsel for plaintiffs in error are entirely mistaken in their brief, when they claim that the McIver case as authority has been impaired by the Supreme Court of Georgia in the later case of Webb vs. Southern Cotton Oil Co., reported in 131 Georgia, 682. On the contrary, the Webb case is identical in facts with the Cox case. A suit which was originally brought in the State Court was removed to the United States Court and there dismissed on the plaintiff's motion. The suit was barred by the statute of limitations except for the Georgia renewal

clause hereinbefore quoted as contained in Section 3786 of the Georgia Code, and the plaintiff sought to avoid the bar of the statute of limitations by bringing his suit over again in the State Court within six months of the dismissal. The Court held that the renewal statute in Section 3786 of the Georgia Code applied only to suits dismissed, nonsuited or discontinued in the State Court, and the 4th headnote (the Court delivering its opinion only through headnotes in this case) reads thus:

"The provisions of the Civil Code, Section 3786, apply only to cases pending in the State Courts, as the Act of 1847 declares: 'That whenever any case now or hereinafter pending in any of the Courts of this State ..... shall be discontinued, dismissed,' etc., the plaintiff may renew the same within six months. Code section 3786 is a codification of this Act of 1847 and of the 33rd section of the Act of 1856."

In this Webb case, the Court in the 2nd headnote expressly hold that the Cox case will only be approved as applied to the particular facts of that case, and the 2nd headnote uses this language:

"In Cox vs. East Tennessee, etc., R. Co., 68 Ga., 446, it was held that where a case had been removed from a State Court to a Federal Court, and, after the time prescribed by the statute of limitations as applicable to the cause of action had elapsed, a nonsuit was granted in the latter court, the case could not be re-brought in the State Court within six months so as to avoid the bar of the statute. As applied to such a case, that decision, upon review, is affirmed," citing as authority the McIver case, 110 Georgia, 223.

So that the Webb case expressly cites the McIver case, and it will be seen that the McIver case shows that the decision in the Cox case was correct so far as it applied to the facts before the Court.

Plaintiffs in error cite six cases which are claimed to sustain this doctrine. The first case is that of Kern vs. Huidekoper, 103 U. S. 485. As was pointed out by Judge Cobb in the McIver case, the case of Kern vs. Huidekoper, 103 U. S. 485, is totally inapplicable here. Judge Cobb's language on page 227 of the McIver case in 110 Georgia, is as follows:

"The case of Kern vs. Huidekoper, 103 U. S. 485, cited in the opinion in the Cox case, does not decide the question presented by the present record. All there ruled (and there are a number of other rulings of that Court to the same effect) is, that when a case has been removed from a State Court to a Federal Court, any action taken by

the State Court while the case is pending in the Federal Court is coram non judice and void. We do not for a moment question the correctness of these decisions."

The second case cited by plaintiffs in error is National Steamship Co. vs. Tugman, 106 U. S. 118. All that was ruled in this Tugman case is thus stated in the 3rd headnote by Mr. Justice Harlan as follows:

"Upon the filing of the petition and bond required by the statute, the suit being removable, the jurisdiction of the State Court absolutely ceases, and that of the Circuit Court immediately attaches, in advance of the filing in the latter of the transcript from the former. All orders thereafter made in the State Court are coram non judice, unless its jurisdiction is, in some form, actually restored."

In this case of Tugman, as in the Kern case, there was no dismissal of the suit in the Federal Court and no attempt to re-bring it in the State Court; but the only question was as to whether the State Court could take any steps while the case was actually pending in the Federal Court.

The third case cited by plaintiffs in error is that of Gordon vs. Longest, 41 U. S. 97 (16 Peters), in which case the questions were identically those of the two cases of Kern and Tugman, and it was simply held that while the case was pending in the Federal Court, every step subsequently taken in the exercise of jurisdiction in the State Court was without authority. No question of dismissal and bringing over in the State Court was involved.

The other case cited of Goldey vs. Morning News, 156 U. S. 523, is to the same effect.

The last two cases cited by counsel for plaintiffs in error to sustain this novel proposition are the McIver case, 110 Georgia, 223, and the Webb case, 131 Georgia, 682, and we have hereinbefore shown that these cases, instead of militating against us, ruled the question in our favor.

We have cited heretofore in this brief a great mass of authorities, in which there is only one discordant note, holding that the plaintiff, if within the original statute of limitations, can re-bring his suit in

the State Court. The exhaustive note to the case of Young vs Southern Bell, etc. Co., 7th L. R. A., (N. S.) page 501, leaves us little to say, except to quote the following from that note:

"Right of plaintiff, after removal of action commenced in State Court to the Federal Court and its dismissal in the latter Court without prejudice, to commence a new action in a State Court upon the same cause of action..... With the exception of one decision and a few dicta which are subsequently referred to, the cases are unanimous in favor of the doctrine of Young vs. Southern Bell Telephone and Telegraph Co., that the removal to the Federal Court of an action commenced in a State Court does not, in the event the action is dismissed in the Federal Court, without a decision on the merits, upon the plaintiff's motion or upon his voluntary submission to a non-suit, prevent him from commencing and maintaining a new action upon the same cause of action in the State Court. The following cases expressly so hold: Gassman vs. Jarvis, 100 Fed. 146; Texas Cotton Products Co. vs. Starnes, 128 Fed. 183, affirmed in 66 C. C. A., 673, 133 Fed. 1022; McIver vs. Florida, C. & P. R. Co., 110 Ga. 223, 65 L. R. A. 437, 36 S. E. 775; Cleveland, C. C. & St. L. R. Co. vs. Reese, 93 Ill. App. 657; Cleveland, C. C. & St. L. R. Co. vs. Lawler, 94 Ill. App. 36; Foley vs. Cudahy Packing Co., 119 Iowa, 246, 93 N. W. 284; Rodman vs. Missouri P. R. Co., 65 Kan. 645, 59 L. R. A. 704, 70 Pac. 642; Swift & Co. vs. Hoblawetz, 10 Kan. App. 48, 61 Pac. 969; Adams Exp. Co. vs. Schofield, 111 Ky. 832, 64 S. W. 903; Stephenson vs. Illinois C. R. Co. 25 Ky. L. Rep. 442, 75 S. W. 260; Stevenson vs. Illinois C. R. Co., 117 Ky. 855, 79 S. W. 767; DeWitt vs. Chesapeake & O. R. Co., 25 Ky. L. Rep. 2019, 79 S. W. 275; Nipp vs. Chesapeake & O. R. Co., 25 Ky. L. Rep. 2335, 80 S. W. 796; S. F. Dana & Co. vs. Blackburn, 28 Ky. L. Rep. 695, 90 S. W. 237; Krueger vs. Chicago & A. R. Co., 84 Mo. App. 358; Fox vs. Jacob Dold Packing Co., 96 Mo. App. 173, 70 S. W. 164; Fleming vs. Southern R. Co., 128 N. C. 80, 38 S. E. 253; Hooper vs. Atlanta, K. & N. R. Co., 106 Tenn. 28, 53 L. R. A. 931, 60 S. W. 607; Illinois C. R. Co. vs. Bentz, 108 Tenn. 670, 58 L. R. A. 690, 91 Am. St. Rep. 763, 69 S. W. 317 (implied); Texas & P. R. Co. vs. Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134. See also Bush vs. Kentucky, 107 U. S. 110, 27 L. ed. 354, 1 Sup. Ct. Rep. 625, referred to in the reported case.

"The ground upon which the doctrine rests, and the distinction between the commencement of a new action in the State Court and the further proceedings in the State Court in the original action, are well stated in the opinion in Swift & Co. vs. Hoblawetz, supra, as follows: 'It (the case of Kern vs. Huidekoper, 103 U. S. 485, 26 L. ed. 354) holds that a compliance with the act of Congress by a party entitled to remove a cause in a case that is removable under the act, removes the cause and the subject-matter, notwithstanding the refusal of the State Court to allow such removal; and that thereafter the State Court has no jurisdiction in that case to proceed further therein. The State Court having been wholly devested of jurisdiction in the case by the removal, it does not follow that when the Federal Court's jurisdiction is devested by the termination of the cause, as on a dismissal without prejudice, the plaintiff cannot choose the forum in which he will bring another action or case founded upon

the same cause of action ..... We hold, on the contrary, that a dismissal without prejudice or other final disposition of the case not upon the merits not only devests the Federal Court of jurisdiction of that case, but of the subject-matter of the suit, and that the plaintiff is at liberty to renew his cause in the State Court, or in any Court having jurisdiction of the subject-matter and of the parties.'

"The rule above stated applies even though the damages laid in the second action are for such a sum as to prevent the removal of the new action to the Federal Court. Texas Cotton Products Co. vs. Stearns, 128 Fed. 183; McIver vs. Florida, C. & P. R. Co.; Cleveland, C. C. & St. L. R. Co. vs. Lawler, Adams Exp. Co. vs. Schofield; Krueger vs. Chicago & A. R. Co.; and Hooper vs. Atlanta, K. & N. R. Co.—supra. In some of the other cases above cited in which the rule was applied it also appeared that the damages in the new action were laid at such a sum as to prevent the removal of the new action to the Federal Court, though no comment was made on the fact.

"In Powers vs. Chesapeake & O. R. Co., 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264, affirming 65 Fed. 129, after the removal of the original action against a railroad company for personal injuries to the Federal Court and its dismissal in the latter Court, the plaintiff commenced a new action upon the same cause of action in the State Court, but, for the purpose of preventing the removal of the new action to the Federal Court upon the ground of diverse citizenship, joined as defendants two of the employees of the company, and, after the expiration of the time in which the defendant was required to answer, discontinued the suit against the individual defendants. A petition for removal having been thereupon filed and granted, it was held by the Supreme Court that the removal was properly granted, notwithstanding that the time when the defendant was required to answer had expired.

"In Yawkey vs. Richardson, 9 Mich. 529, 81 Am. Dec. 769, also, the fraudulent attempt of the plaintiff to prevent the removal of the new action was frustrated. In that case it appeared that the plaintiff originally brought an action against a single defendant, a citizen of another state, who thereupon caused the case to be removed to the Federal Court. Plaintiff then discontinued that action and brought a new action in the State Court against the same defendant and another person, a citizen of his own state, for the same cause of action. The trial Court afterwards permitted the plaintiff to discontinue as against the new defendant; but upon appeal the State Supreme Court, upon the ground that the plaintiff had undertaken to perpetrate a fraud, held that the discontinuance was improper, and, since a discontinuance against one, except when permitted by law, is a total discontinuance, reversed the judgment for plaintiff without granting a new trial.

"It has also been held that the new action in the State Court may be maintained although the action in the Federal Court was not dismissed until after the commencement of the action in the State Court. S. F. Dana & Co. vs. Blackburn, supra. And the dismissal of an action in the Federal Court, even after plea in abatement in the action in the State Court, is sufficient to prevent the abatement of that action, unless it appears that it was brought for the purposes of vexation. Wilson vs. Milliken, 103 Ky. 165, 42 L. R. A. 449, 82 Am. St.

Rep. 578, 44 S. W. 660; Harby vs. Patterson, (Tex. Civ. App.) 59 S. W. 63.

"Nor, where the action in the Federal Court has been dismissed, may the action in the State Court be properly abated until the costs incurred in the Federal Court are paid. Harby vs. Patterson, supra. The general question as to the effect of the dismissal of an action in the Federal Court upon a pending action in the State Court or vice versa is discussed in a note in 42 L. R. A. 459.

"The case of Baltimore & O. R. Co. vs. Fulton, 59 Ohio St. 575, 44 L. R. A. 520, 53 N. E. 265, seems to be the only express judicial authority against the doctrine first above stated. That case and the case of Cox vs. East Tennessee, V. & G. R. Co., 68 Ga. 446, upon which the Ohio Court relied, are sufficiently discussed in the opinion in Young vs. Southern Bell Telephone and Telegraph Co. As there shown, the point was not involved in the Georgia case, and the dicta on which the Ohio Court relied were subsequently withdrawn in McIver vs. Florida C. & P. R. Co., 110 Ga. 223, 65 L. R. A. 437, 36 S. E. 775. There was also a dictum in Chesapeake & O. R. Co. vs. Riddle, 24 Ky. L. Rep. 1687, 72 S. W. 22, founded upon the Ohio case, against the doctrine sustained by the weight of authority; but this dictum also was expressly withdrawn in the subsequent case of Stevenson vs. Illinois C. R. Co., supra.

"The case of Kern vs. Huidekoper, supra, has been sometimes invoked in support of the contention that a new action will not lie in the State Court; but, as pointed out in the opinion in McIver vs. Florida C. & P. R. Co., supra, the Kern case did not pass upon this question, but merely ruled that when a case has been removed from a State to a Federal Court any action taken by the State Court while the case is pending in the Federal Court is coram non judice and void. That principle, of course, does not conflict with the doctrine that a new action may be maintained in the State Court after the first action has been dismissed in the Federal Court.

"The doctrine first above stated presupposes that there is no objection arising from the statute of limitations, or other cause than the previous jurisdiction of the Federal Court over the matter in litigation, to the maintenance of the new action in the State Court. Whether the running of the limitation is suspended during the original action so as not to be available against the new action presents a distinct question which is not considered in this note. It is assumed for the purposes of this note that the original removal from the State to the Federal Court was proper, and conferred jurisdiction of the original action upon the Federal Court; and the cases falling within the scope of this note are therefore to be distinguished from cases like Seeligson vs. Texas Transp. Co. 70 Tex. 108, 7 S. W. 708, involving the jurisdiction of the State Court over the original action where the removal, or attempted removal, to the Federal Court was improper and did not confer jurisdiction upon the Federal Court."

What we have hereinbefore said, we think, sufficiently discusses

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the question as to the plaintiff's right to bring this suit over in the State Court.

Respectfully submitted,

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